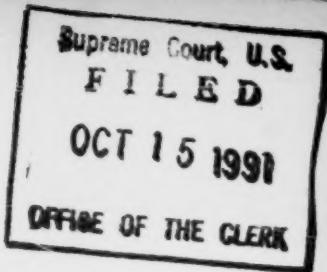


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91-632



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

LOIS MILLSPAUGH and TINA DYSON,
Petitioners

v.

COUNTY DEPARTMENT OF PUBLIC WELFARE
OF WABASH COUNTY, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether parental custody and choice in matters of family life are clearly established rights protected by the Fourteenth Amendment and Title IV-E of the Social Security Act enforceable under 42 U.S.C. 1983.

Whether a welfare caseworker has absolute immunity from liability under 42 U.S.C. 1983 for damages resulting from (1) using a series of ex parte judicial hearings to procure Court orders to remove and detain children without service of process or notice to the Mothers, and (2) withholding material evidence from the Court to prevent the Court from ordering the children returned to their Mothers.

Whether a welfare caseworker acts in an objectively reasonable manner by knowingly



using an affidavit that contains false statements of material fact, statements for which there are no known supporting facts, and bare conclusions, to obtain an ex parte Court order to take children from their Mothers in order to complete an investigation to determine whether the children should remain in their Mothers' custody.

Whether the actions of a local welfare department director, who by statute possesses of the powers of the Department, can establish Department policy, custom or practice sufficient to impose liability on the Department for violations of 42 U.S.C. 1983.

mills7



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TABLE OF AUTHORITIES

CASES

Austin v. Borel, 830 Fed2d 1356 (3rd Cir.)
1987.

Babcock v. Taylor, 884 Fed2d 497 (9th Cir.)
1989 cert denied 110 S.Ct. 1118 (1990)

Brady v. Maryland 373 U.S. 83 (1963)

Chavis v. Rowe 643 F2d 1281 (1981).

Hodorowski v. Ray, 884 Fed2d 1210 (5th Cir.) 1988

Illinois v. Gates 462 U.S. 213 (1983)

J.H.H. v. O'Hara, 878 Fed2d 240 (8th Cir.)
1989 110 S.Ct. 1117 (1990)

Maine v. Thiboutot (1980) 448 U.S. 1, .

Malley v. Briggs 475 U.S. 335 (1986)

Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247

Owen v. Sidias Independence (1980) 452 U.S. 622

Pembaur v. Cincinnati (1986) 475 U.S. 469

Smith v. Organization of Foster Families
(1977) 431 U.S. 816

U.S. v. Agurs 427 U.S. 97 (1976).



STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I

U.S. Const. Amend. IV

U.S. Const. Amend. XIV

28 U.S.C. Section 1254(1)

42 U.S.C. Section 671

42 U.S.C. Section 671(a) (3), (15), (16)

42 U.S.C. Section 675

42 U.S.C. Section 1983

Indiana Code 12-1-4-1



INTRODUCTION

Lois Millspaugh, Tina Dyson and respectfully pray this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, reported at 937 F.2d 1172, is reproduced in Appendix, page 2.

The unpublished Memorandum and Order of the United States District Court for the Northern District of Indiana, dated July 31, 1990, is reproduced in Appendix, page 24.

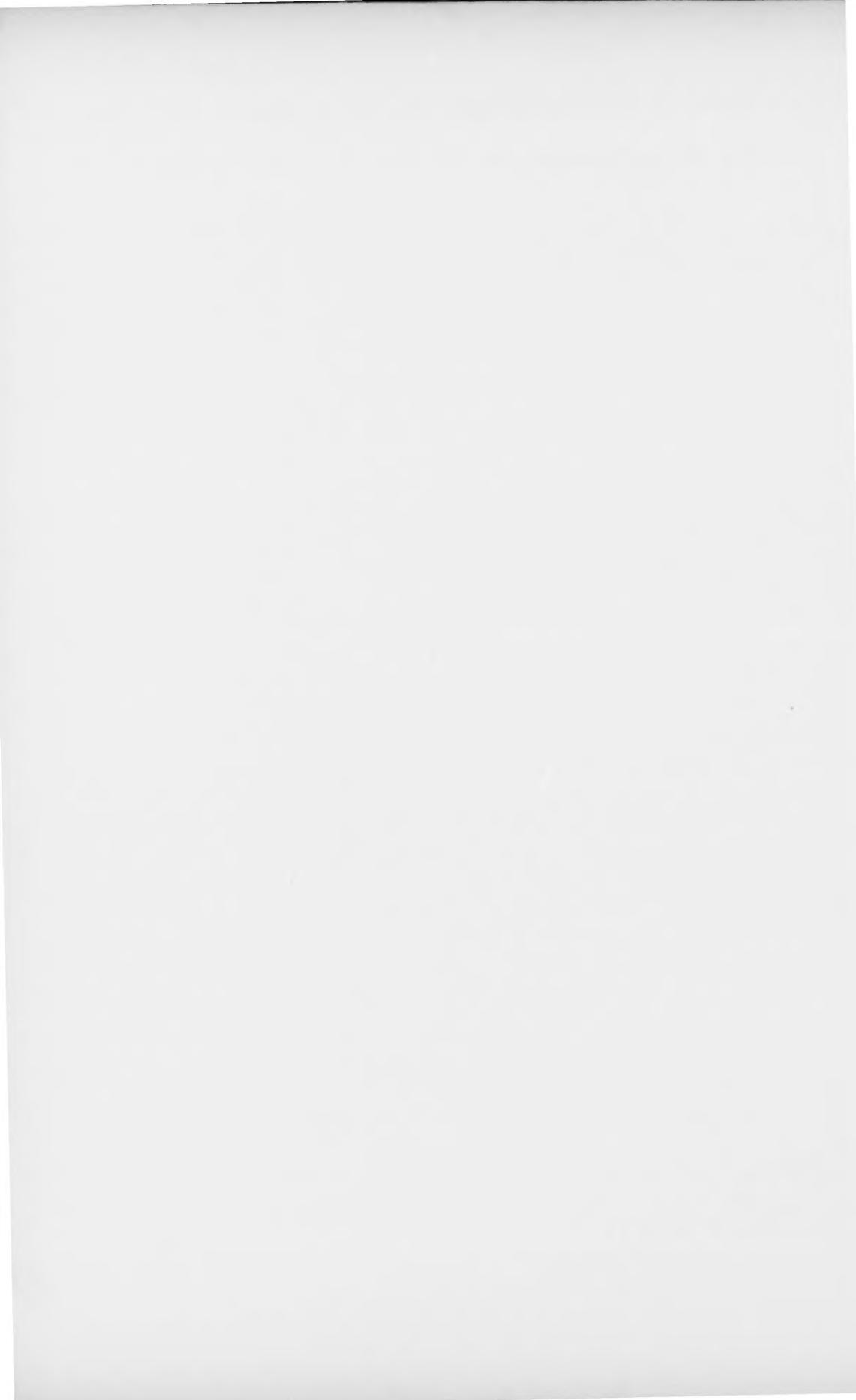
JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 15,



1991. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be



seized.

United States Constitution, Amendment 14,
Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42:

Section 1983. Civil Action for Deprivation of Rights.



Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code, Title 42:

Section 671. State Plan for Foster Care and Adoption Assistance.



See Appendix, p. 106.

United States Code, Title 42:

Section 675. Definitions.

See Appendix, p. 117.

Indiana Code 12-1-4-1: Powers and Duties;
Exercise of Powers.

See Appendix, p. 124.



STATEMENT OF THE CASE

Since October, 1982, Lois Millspaugh and Tina Dyson, hereinafter Mothers, and their children lived in a home in Wabash, Indiana with 3 other members of Faith Ministries, a religious group that lived by faith and believed God would provide for their needs. The Wabash County Department of Public Welfare, hereinafter Department, had been watching the Mothers and children for over a year. The children attended public schools, were excellent students, always had sufficient food and never had any serious physical problems because of lack of food, medical attention, shelter, education or supervision.

In January, 1984 the members of Faith Ministries, believing God wanted them to remodel the home and embark on a religious mission, employed a contractor who removed



everything in the home. When the cooking facilities were removed, the group, including the Mothers and children, moved to a motel-restaurant in Wabash. A few days later they left Wabash on their religious mission.

Caseworker Manetta Tucker and the Department Director received an anonymous report that the Mothers had given away their possessions and the children had no food. Tucker and the Department Director determined the Mothers had removed the children from school, traveled to Kokomo where they were given food, shelter and money, and then to the Indianapolis home of the daughter of one of the group's members. They looked in the windows of the home the group had left and saw everything had been removed.



Tucker, with the help and approval of the Department Director, used an affidavit they knew contained false statements of material fact and unsupported conclusions to obtain an ex parte court order to remove the children. The affidavit alleged the Mothers and the children were at a church in Kokomo with no food or money, the Mothers were mentally incapable of caring for the children, and that the children's physical or mental condition was seriously impaired or seriously in danger because of the actions of the Mothers. Tucker admits the children were removed because Tucker and the Department Director were "concerned", "weren't sure", and were "questioning and wondering." Tucker admits there was not enough information to determine if the Mothers could provide for the children, no-one had asked if the Mothers could get money or if shelter was available, no-one

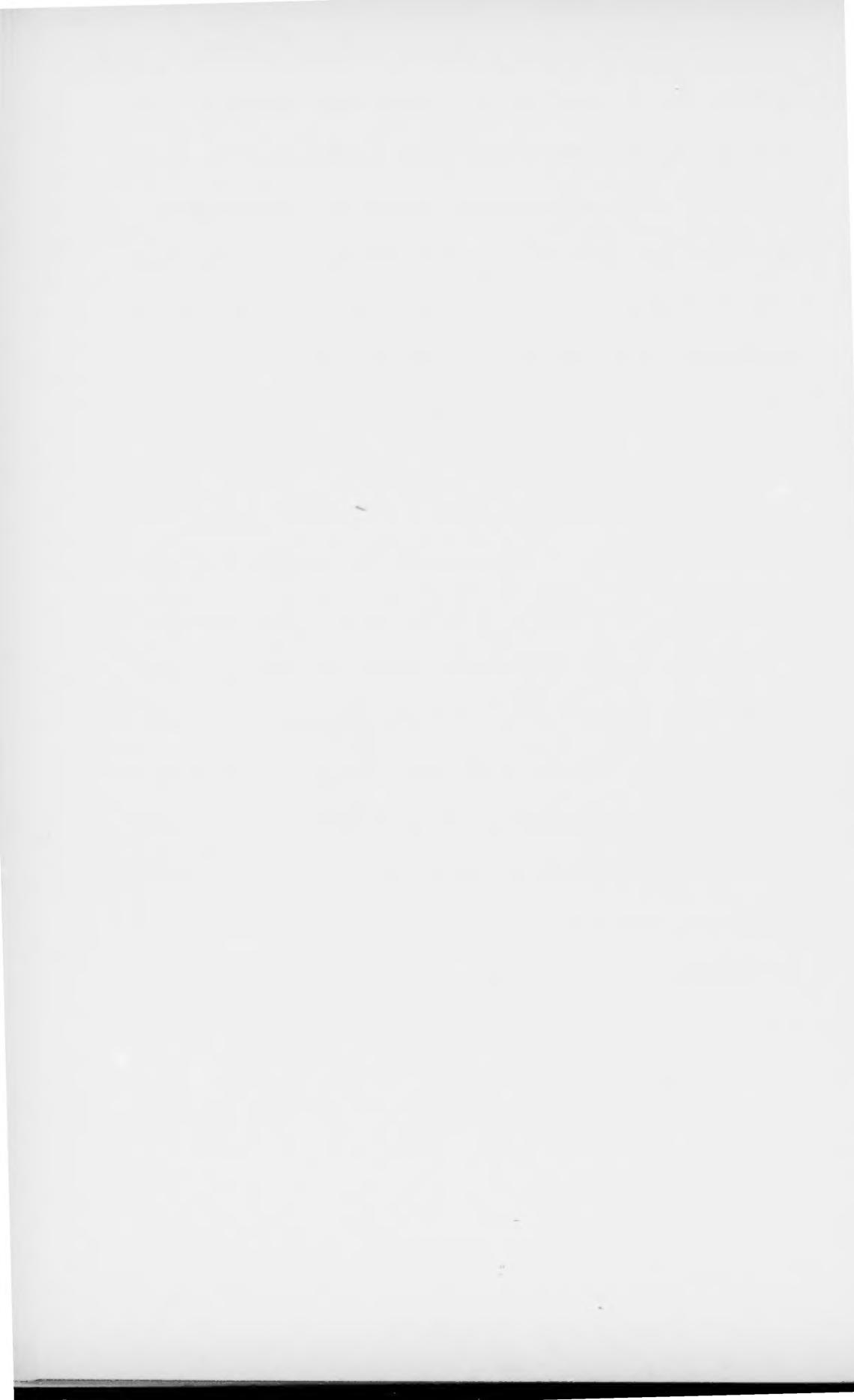
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believed the children's physical health was seriously in danger, there was nothing to suggest the children had any mental injury, there was no information the children had suffered any physical injury, there was no information it would be harmful for the children to travel with their Mothers, and there was no information the children's physical condition was seriously impaired or endangered. State law, promulgated in compliance with Title IV-E of the Social Security Act [42 U.S.C. 671(A)(15)], only permitted removal of the children without notice and hearing if there was probable cause to believe the children had suffered mental or physical injury, or if their physical or mental condition was seriously impaired or endangered.

After the children had been taken from the Mothers, the Department and Tucker partici-



pated in a series of hearings before the state court involving the continued detention of the children without service of process or notice to the Mothers. Shortly after Tucker took the children from their Mothers, the children were examined by a physician and psychologist who pronounced them healthy and free of emotional or psychological problems. Tucker and the Department never informed the Court of any of these reports. Tucker and the Department knew the Mothers lived by faith and were traveling on a religious mission, but refused to allow the children to travel with them or return the children to them unless they abandoned their religious mission, returned to Wabash, got a job and submitted to a psychiatric evaluation and/or counseling. Tucker admits she would allow the Mothers to live by faith and



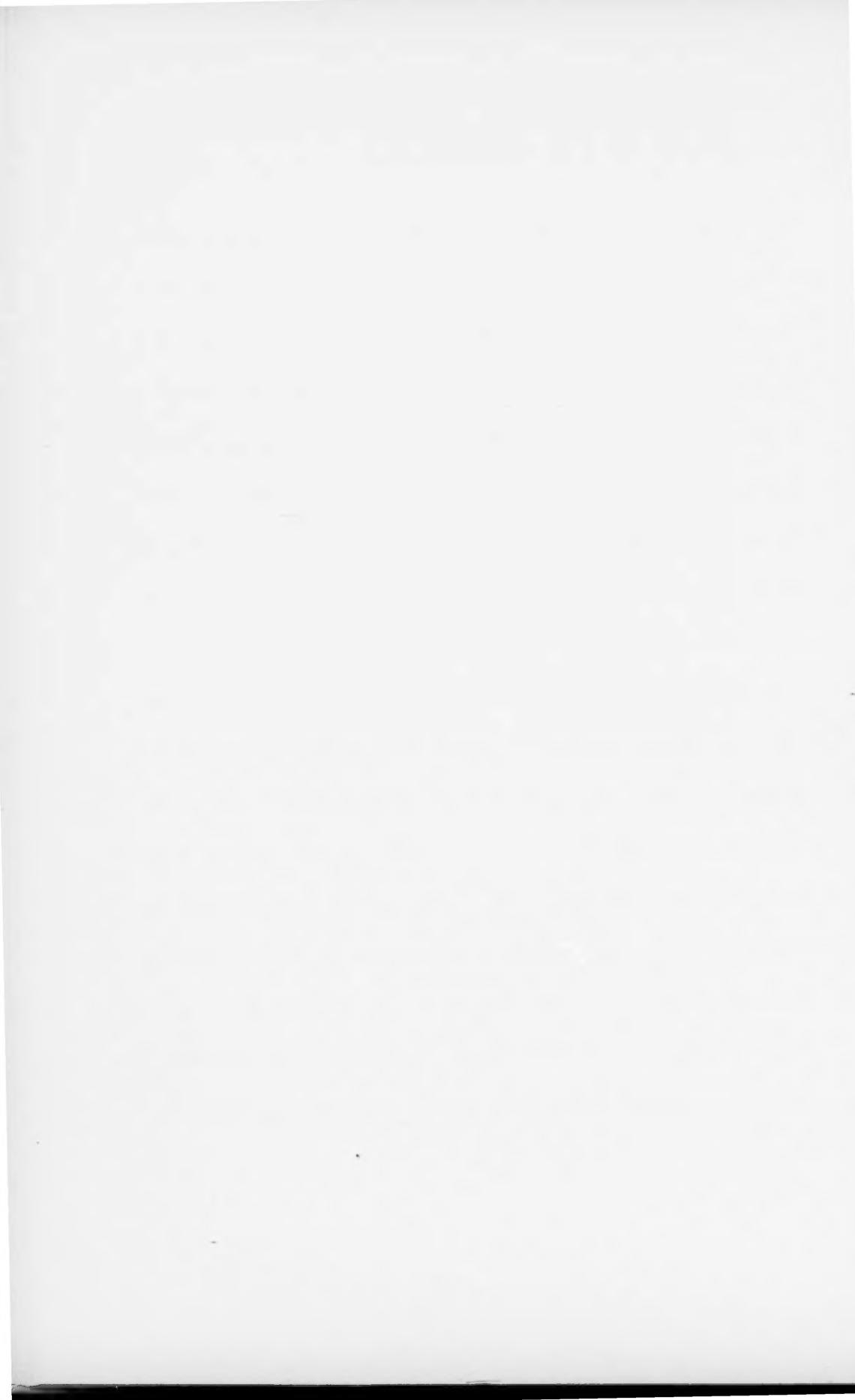
depend on God to provide only if they could provide her with the names and addresses God was going to use to provide so she could check them out. Tucker also admits the Department refused to allow two of the children to attend a religious meeting because they wanted the children to question the religious beliefs their Mothers had taught them. The state court ultimately ruled the Mothers' constitutional rights had been violated because they had not been properly served with process, set aside its earlier findings, and, after hearing evidence, found the children were not in need of services and ordered them returned.

Indiana law gave the Department Director all of the rights, powers and duties of the Department. The attorney for the Department approved the petition that was filed with the Court to obtain the order to

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take the children, and prosecuted the case on behalf of the Department.

On January 31, 1986 the Mothers filed their complaints under 42 U.S.C. 1983 against Tucker and the Department in the United States District Court for the Northern District of Indiana. Amended complaints under 42 U.S.C. 1983 and Title IV-E of the Social Security Act were filed. Jurisdiction of the District Court was based on 28 U.S.C. 1331 and 1343, by reason of the claims being actions brought to redress the deprivation under color of law, statute, regulation, custom, and the usage of the State of Indiana, of rights, privileges and immunities secured by the laws and Constitution of the United States, particularly Title IV-E of the Social Security Act and the First, Fourth and Fourteenth amendments. The complaints alleged violations



of the First, Fourth, and Fourteenth Amendment and Title IV-E of the Social Security Act, that the children had been unlawfully taken from the Mothers because the Court orders by which they were taken were constitutionally deficient in that the affidavits submitted in support of the applications for the orders did not set forth sufficient facts to establish probable cause to believe the children had suffered mental or physical injury or that their physical or mental condition was seriously impaired or in danger, that taking the children interfered with the free exercise of the mother's religion, that reasonable efforts were not taken to prevent or eliminate the need to remove the children, and that reasonable efforts were not taken to return the children as required by Title IV-E of the Social Security Act.



On August 1, 1990 the District Court granted summary judgment to the Department and Tucker dismissing all claims of the Mothers on the basis that no clearly established rights of the Mothers had been violated, that Tucker's conduct was reasonable, and that the actions of Tucker and the Department Director were not according to any established Department policy, custom or practice.

The Court of Appeals for the Seventh Circuit affirmed the District Court, deciding that the Mothers' rights had not been violated by any unconstitutional rule or policy of the Department, that Tucker had absolute immunity for the steps taken by her to present the case for decision to the state court because they were prosecutorial actions, and that the remainder of Tucker's



actions were protected by qualified immunity because she had an objectively reasonable basis for them.



REASONS RELIED ON FOR THE ALLOWANCE
OF THE WRIT

A writ of certiorari should be granted in this case because the decision of the Court of Appeals permits a welfare caseworker and a county department of public welfare to remove children from their Mothers without probable cause, in violation of Title IV-E of the Social Security Act, and then to deprive the Mothers of the liberties by participating in a series of judicial proceedings without service of process or notice.

A writ of certiorari should be granted in this case to resolve the question of whether parental custody and choice in matters of family life are clearly established rights protected by the Fourteenth Amendment and Title IV-E of the Social Security Act enforceable under 42 U.S.C. 1983. This

Court held in Smith v. Organization of Foster Families (1977) 431 U.S. 816 that the rights of parents to make personal choices in matters of family life are liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Title IV-E requires the child welfare systems of the state use reasonable efforts prior to the placement of a child in foster care to prevent or eliminate the need for removal of the child from his home, and use reasonable efforts to make it possible for the child to return to his home. 42 U.S.C. 671(a)(3), (15), and (16). In Maine v. Thiboutot (1980) 448 U.S. 1, this Court held that the various provisions of the Social Security Act were enforceable under 42 U.S.C. 1983. The purpose of IV-E is to assure to citizens certain minimal rights and protections and guarantees that, when local governing units take action in areas

involving both the welfare of children and the family rights of parents, those governing units follow certain procedures, guidelines and steps which the Congress has determined are needed in order to assure that the actions taken are in fact in the best interest of both.

The Court of Appeals correctly concluded that Tucker had ample basis for taking the initial steps "to determine" whether the children should remain in their mother's custody, however, that was not all that was done in this case. Before the children could be removed without notice and hearing, state law, promulgated in compliance with Title IV-E, required probable cause to believe that the children had suffered mental or physical injury or that their physical or mental condition was seriously impaired or endangered. Tucker has admit-

ted that no one believed the children's physical health was in serious danger, there was nothing to suggest that the children had mental injury, there was no information that the children had suffered any physical injury, there was no information that it would be harmful for the children to travel with their Mother's, and there was no information that children's physical condition was seriously impaired or endangered. Tucker's admissions are contrary to the conclusion of the Court of Appeals that Tucker had probable cause to believe these necessary elements actually existed.

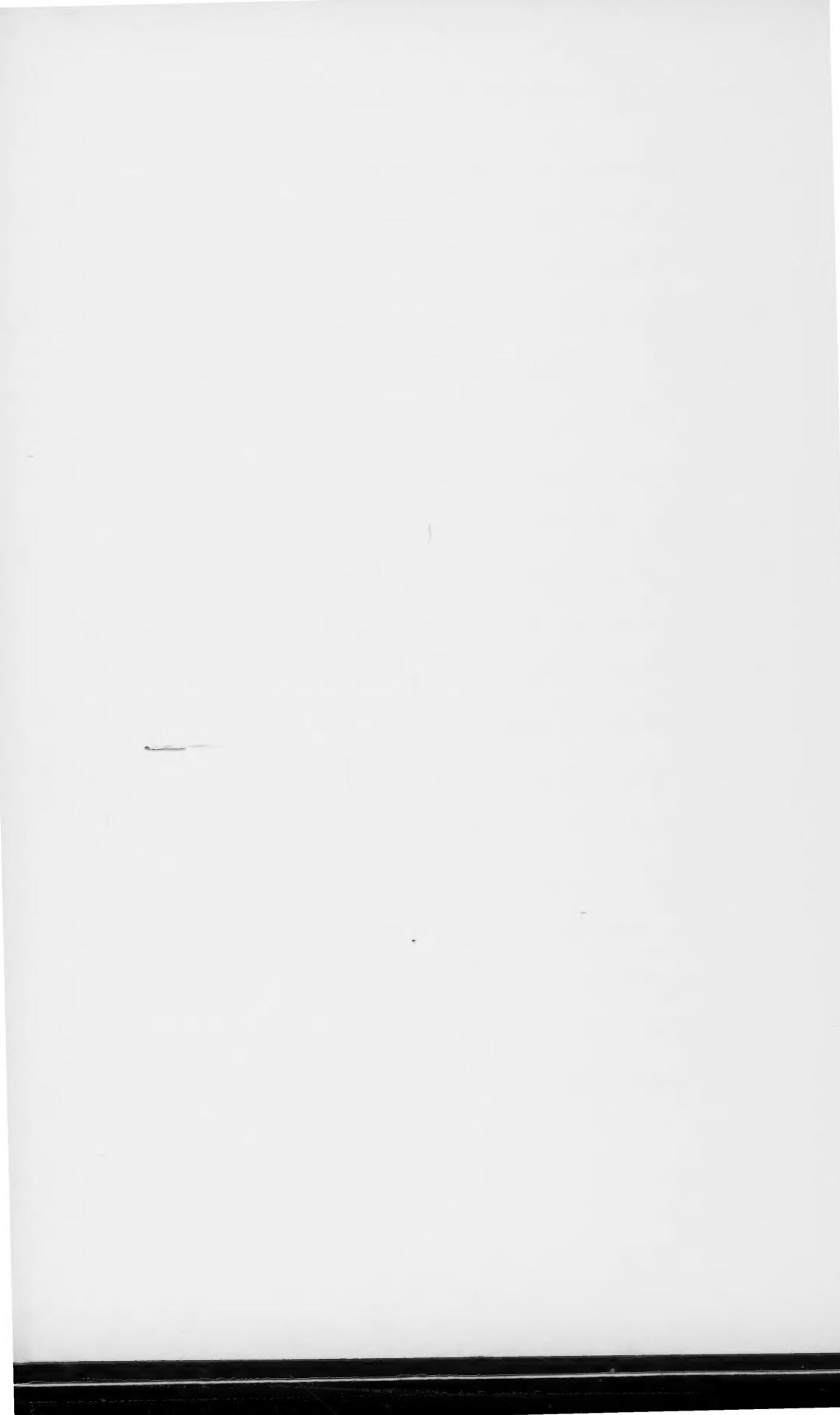
The decision of the Court of Appeals gives a welfare caseworker the right knowingly to use an affidavit that contains false statements of material fact, statements for which there are no known supporting facts,

and mere conclusions, to obtain an ex parte court order to remove children without liability for damages under 42 U.S.C. 1983. That decision is in conflict with this Court's decision in Malley v. Briggs 475 U.S. 335 (1986) that a government official must possess sufficient reliable facts from which to conclude that probable cause existed in fact and present those facts by oath or affirmation to a Court in a manner from which a neutral and detached magistrate could make an independent determination that the facts as presented were sufficient to constitute probable cause, and with this Court's decision in Illinois v. Gates 462 U.S. 213 (1983) that information from anonymous or unidentified sources may not be considered in establishing probable cause without supporting or corroborating evidence and that conclusory



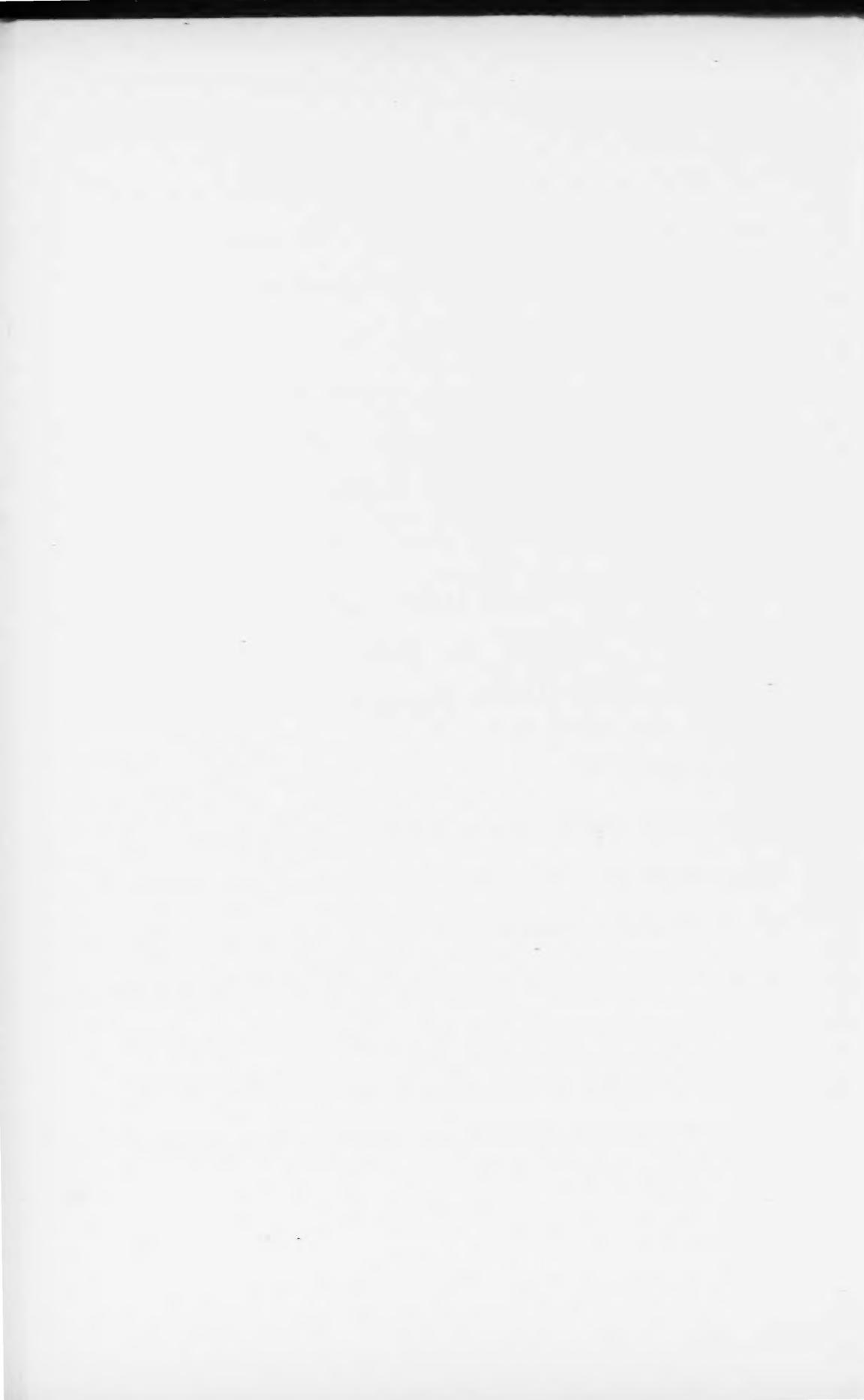
statements must be disregarded.

The decision of the Court of Appeals that the Mothers have not identified an unconstitutional policy or rule of the Department conflicts with the decision of this Court in Pembaur v. Cincinnati (1986) 475 U.S. 469 which held that governmental liability under 42 U.S.C. 1983 attaches where a deliberate choice to follow a course of action is made by the government official responsible for establishing final policy with respect to the subject matter in question. The Department Director had final policy-making authority for the Department on all matters because Indiana Code 12-1-4-1 gave the Director all of the rights, powers and duties of the Department. The Director reviewed all of the facts and made the ultimate decision that the caseworker should file the affidavits



used to obtain the order to remove the children, and thereafter continuously reviewed and approved the actions of the caseworker. The Court of Appeals' decision also conflicts with this Court's decisions that unconstitutional government policy, custom or practice may be inferred from a single act or decision taken by a governmental official with policy-making authority. Owen v. Sidias Independence (1980) 452 U.S. 622; Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247; Pembaur v. Cincinnati, supra.

A writ of certiorari should be granted in this case to resolve the question of whether a welfare caseworker has absolute immunity from liability under 42 U.S.C. 1983 for damages resulting from (1) using a series of ex parte judicial hearings to procure court orders to remove and detain



children without service of process or notice to the mothers, and (2) withholding material evidence from a Court to prevent the Court from ordering the children returned to their mothers.

The decision of the Court of Appeals conferring absolute immunity on a welfare caseworker is in conflict with the decisions of other Circuit Courts of Appeals.

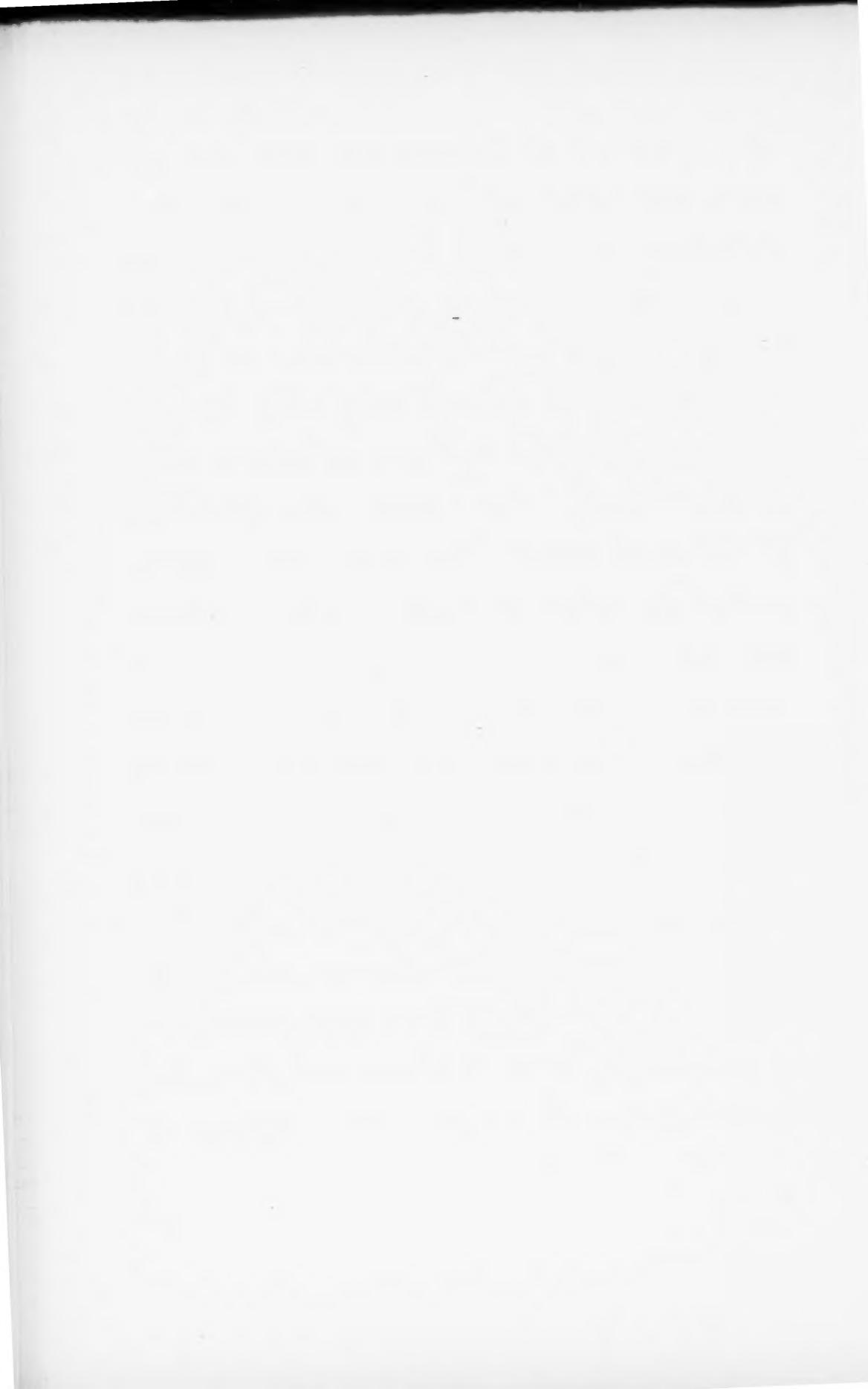
Babcock v. Taylor, 884 Fed2d 497 (9th Cir.) 1989 cert denied 110 S.Ct. 1118 (1990); J.H.H. v. O'Hara, 878 Fed2d 240 (8th Cir.) 1989 110 S.Ct. 1117 (1990); Hodorowski v. Ray, 884 Fed2d 1210 (5th Cir.) 1988; Austin v. Borel, 830 Fed2d 1356 (3rd Cir.) 1987.

The decision of the Court of Appeals that a welfare caseworker is entitled to absolute immunity from liability under 42 U.S.C. 1983 for damages resulting from withholding material evidence from a Court is an impor-



tant question of federal law that has not been, but should be, settled by this Court. Congress, in enacting Title IV-E of the Social Security Act, established as federal policy limits on the instances in which children may be removed from their parents and mandated steps be taken to assure their prompt return. The removal and detention of children demands the same type of safeguards as those afforded criminal Defendants because both involve a deprivation of liberty. The state has a duty to disclose exculpatory material, and failure to do so is a violation of 14th Amendment rights.

Brady v. Maryland 373 U.S. 83 (1963); U.S. v. Agurs 427 U.S. 97 (1976). The 7th Circuit Court of Appeals itself has recognized that a breach of this duty gives rise to an action by a criminal defendant for damages under 42 U.S.C. 1983. Chavis v.



Rowe 643 F2d 1281 (1981). Parents whose children have been taken by the state should have the same rights.

Respectfully submitted by:

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brief

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

LOIS MILLSPAUGH and TINA DYSON,
Petitioners

v.

COUNTY DEPARTMENT OF PUBLIC WELFARE
OF WABASH COUNTY, et al.,

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PETITION FOR WRIT OF CERTIORARI TO THE
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APPENDIX

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-2910
LOIS MILLSPAUGH and TINA DYSON,
Plaintiffs-Appellants,

v.

COUNTY DEPARTMENT OF PUBLIC WELFARE
OF WABASH COUNTY, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division.
Nos. S86-53 and S86-54-
Robert L. Miller, Jr., Judge.

Before EASTERBROOK and MANION, Circuit
Judges, and ESCHBACH, Senior Circuit Judge.

EASTERBROOK, Circuit Judge. Lois Mill-
spaugh and Tina Dyson belong to the Faith



Ministries and travel at God's direction. Members of the Ministries give away all of their worldly possessions, believing that God will provide for them at each destination. Between late 1982 and early 1984 Lois Millspaugh, her daughters Jean and Paula; Tina Dyson, her daughters Vicki and Renee; and Jewell McLaughlin lived together in Wabash, Indiana. The four daughters attended public school, receiving high grades (in 1985 Jean was valedictorian of her high school class).

On February 2, 1984, the County's Department of Public Welfare received a tip that the mothers had given away their possessions and that the children lacked food. Caseworkers quickly determined that the house had been stripped of all furnishings (even the kitchen sink had vanished), and that the three adults had departed for



Kokomo, taking the four children with them. The children had been removed from school without notice-and, as it turned out, without plans to enroll them in another school. Rev. Bob Merrill in Kokomo told the Department that the seven had arrived with no money and no possessions other than the clothes they were wearing; Rev. Merrill fed and housed them for a day, after which they left for Indianapolis. This was too much for the Department, which obtained an ex parte order from a state court directing the Department to take the children into custody so that the court could determine whether they were "children in need of services", see Ind. Code Section 31-6-4-10. Such a finding would support their placement in foster homes. Manetta Tucker, one of the Department's social workers, signed the application for the order.

Police found the children in Indianapolis on February 8. The state judge had set a hearing for February 10; we must assume that the police did not serve the mothers with that order or otherwise notify them of the court date. Tucker went to Indianapolis with Paul Wildridge, a friend of the families, and retrieved the children. The mothers continued on their mission, which left them no time to contact the Department. They made no effort to get in touch before February 17, although they did ask the Department to send messages through Wildridge. The mothers say that they received few messages and blame Tucker; Tucker says she left word with Wildridge and blames him; the record includes some written notices sent to Wildridge and returned unopened. At all events, the proceedings were to remain one-sided for some time.

A physician in Wabash pronounced the children healthy, and a clinical psychologist thought them free of emotional or psychological problems. Tucker did not find this reassuring and pressed the motion to have the children separated from their mothers-without informing the court of these reports. The judge made a preliminary finding that the children were in need of services and called for more studies and hearings. The mothers traveled to Ohio, Virginia, Tennessee, North Carolina, Florida and several suburbs of Washington, D.C., without checking on their children. Both skipped a hearing on March 16, because they explained, they were on a mission for God, who did not wish them to be in Indiana. Tucker and Lois Millspaugh did speak by telephone on March 16, and Charles Millspaugh, the father of Jean and Paula,

appeared at the hearing. There were more hearings, none of which the mothers attended (and for each hearing there is a dispute about whether the mothers had been told, directly or through Wildridge, in time to attend).

In late 1984 the court held a hearing at which the mothers were represented by counsel who had been engaged during a brief visit Lois Millspaugh paid to Indiana. The court vacated its earlier orders, concluding that the mothers lacked sufficient notice, and re-started the process. Meanwhile the mothers were on the move, traveling to England, France, Holland, Switzerland, Italy, Greece, Jerusalem, Tel Aviv, Bangkok, Seoul, and Honolulu. Tina Dyson returned to Wabash in May 1985. Lois Millspaugh was in Hawaii when she learned in July 1985 that these additional proceed-



ings had ended in an order remanding the three minor children to their mothers; custody (Jean Millspaugh had turned 18 shortly before). Lois Millspaugh took custody of her daughter Paula on July 22 after returning via Maryland; eighteen days later Paula ran away, rejoining her foster family. Vicki Dyson also wanted to stay with her foster parents; Tina allowed Vicki to do so. The record does not reveal whether Paula Millspaugh and Renee Dyson have returned to their mothers.

The mothers filed this suit under 42 U.S.C. Section 1983, contending that Tucker and the Department deprived them of their children without due process of law. The mothers also believe that Tucker and other social workers disapproved of their faith and took the children both to turn the children away from the religion and to



induce the mothers to give up their travels. All of this violates the first amendment, the mothers submit. The district court granted the defendants' motion for summary judgment. 746 F. Supp. 832 (N.D. Ind. 1990).

The district court concluded that the mothers had not established a causal link between the Department's policies and their loss. Because the Department may be liable only on account of its own policies, and not vicariously for the acts of Tucker (who is not a "policymaker"), Monell v. Department of Social Services, 436 U.S. 658 (1978), the mothers needed to identify an unconstitutional policy and show how its application caused their injury. We agree with the district court that the mothers did neither of these things. In this court the mothers have not identified any rule or



policy of the Department that they believe violates the Constitution; they contend, rather, that the Department sorely erred in its handling of their case. That is not enough under Monell.

Tucker prevailed because the district court concluded that she is entitled to immunity as a matter of law. Finessing the question whether the immunity should be qualified or absolute, the district judge held that Tucker would prevail under either standard. The mothers contest this, pointing to a list of things it was clearly established that social workers should not do. They contend that Tucker initiated the proceedings without adequate cause, lied in her application for the ex parte order, failed to notice them of hearings or furnish the court with medical and psychological reports showing that the children



did not need care, and persevered in the case because of animosity toward their religion rather than concern for the children's welfare. All of these things, the mothers submit, were so clearly unlawful that the objective standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982), and Anderson v. Creighton, 483 U.S. 635 (1987), precludes immunity.

Some of the mothers' arguments concern Tucker's behavior in court. They say that she (1) failed to furnish the court with material that would have been favorable to parental custody, (2) pursued the litigation after it should have been clear that the mothers were entitled to custody, (3) pursued the litigation for an improper notice, and (4) neglected to ensure that the mothers received adequate notice of hearings. In all of these respects, Tucker

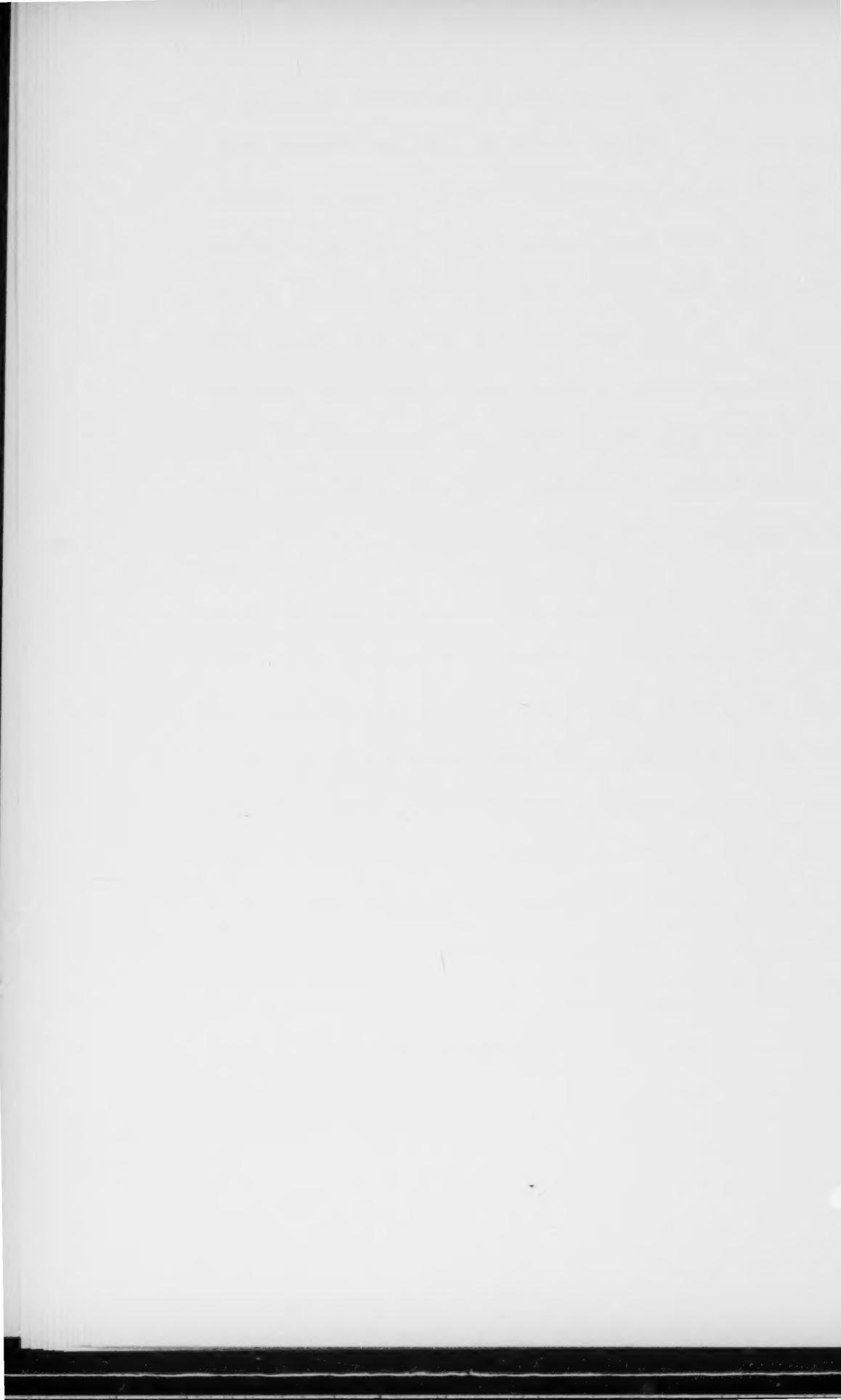


acted as both a prosecutor and witness. They made arguments to the court, furnished or withheld evidence, and so on. Prosecutors and witnesses are absolutely immune from liability in damages on account of their acts in court. We held in Buckley v. Fitzsimmons, 919 F.2d 1230, 1239-45 (7th Cir. 1990), that the dividing line between absolute and qualified immunity is whether the injury depends on the judicial decision. If there would be no loss but for the judge's acts, then the prosecutor or witness who induces the judge to act has absolute immunity. We drew this conclusion from Imbler v. Pachtman, 424 U.S. 409 (1976), which discusses prosecutorial immunity, and Briscoe v. LaHue, 460 U.S. 325 (1983), which discusses witness immunity. After oral argument in this case the Supreme Court decided Burns v. Reed, 111 S.



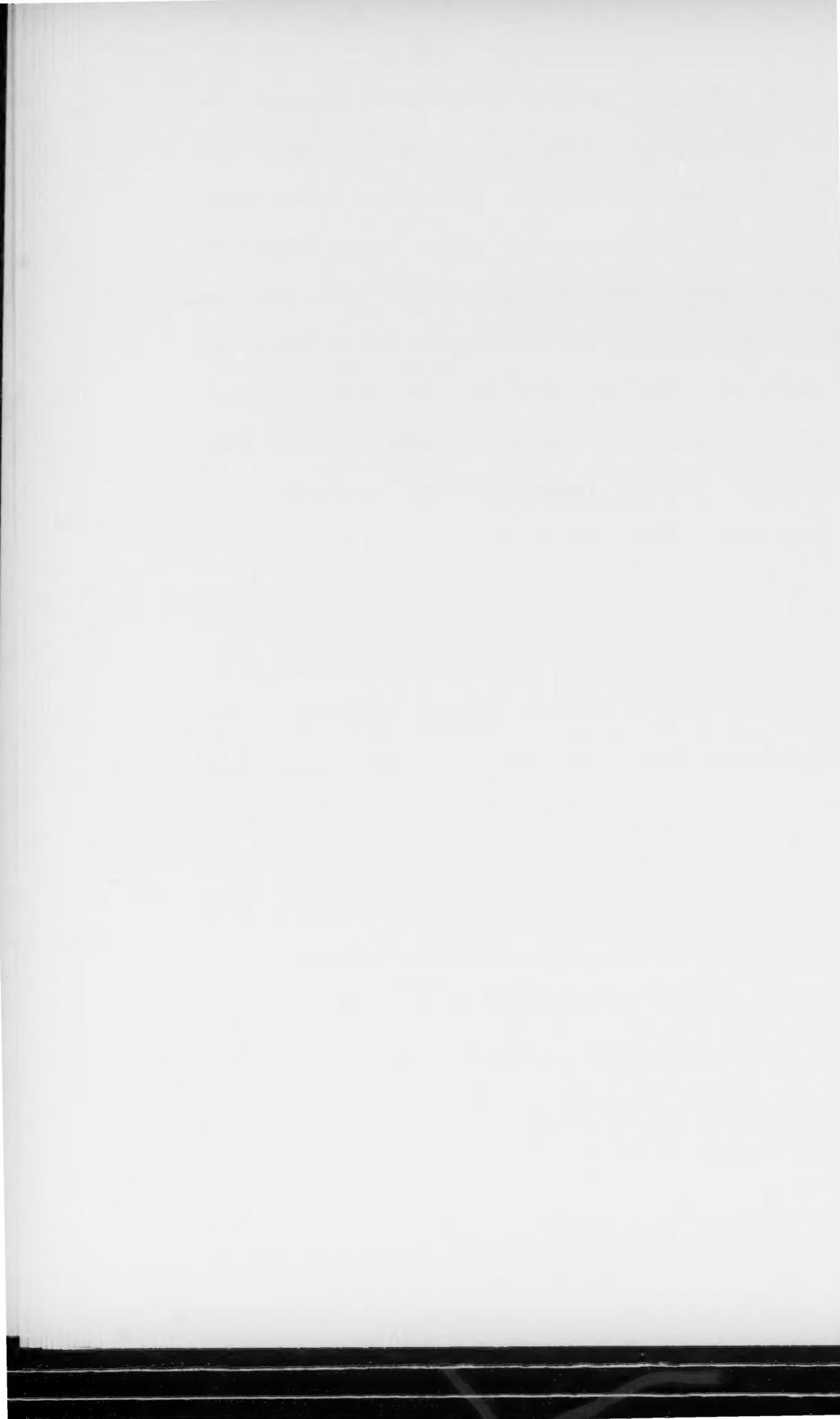
Ct. 1934 (1991), which reinforces Buckley's approach. Burns held a lawyer absolutely immune from liability for acts while representing the state during a probable cause hearing but only qualifiedly immune for giving legal advice to the police; the principal distinction was that the advice (and the officers' acts in reliance on that advice) could cause injury without the medication of a judge.

Most of what Tucker did could yield no harm to the mothers unless the court agreed. Her motives in asking the court to do certain things, and her selection of evidence to present, lie at the core of the subjects to which absolute immunity applies. Even failure to supply adequate information to the mothers (assuming that Tucker rather than Wildridge bears the responsibility) is something that could



cause no loss unless the court pressed on to decision. The judge knew that the mothers were no there; the judge knew that they were unrepresented, and that communication with them was sporadic. Whether to proceed in such circumstances is a judicial decision. We may assume that Tucker acted out of improper motives and misled the court. Still, immunity that applies only when the defendant did no wrong is no immunity at all.

Protection does not vanish when the proceeding is *ex parte*; Burns observes that absolute immunity covers testimony and prosecutorial acts before a grand jury, which conducts *ex parte* inquiries. 111 S. Ct. at 1941 & n.6. We therefore agree with decisions holding that social workers and like public officials are entitled to absolute immunity in child custody cases on



account of testimony and other steps taken to present the case for decision by the court. Malchowski v. Keene, 787 F.2d 704, 711-14 (1st Cir. 1986); Walden v. Wishengrad, 745 F.2d 149 (2d Cir. 1984); Vosburg v. Department of Social Services, 884 F.2d 133 (45h Cir. 1989); Stem v. Ahearn, 908 F.2d 1, 6 (5th Cir. 1990); Kurzawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984); Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989); Meyers v. Contra Costa County Department of Social & Health Services, 834 F.2d 758, 762-65 (9th Cir. 1987). See also K.H. v. Morgan, 914 F.2d 846, 854 (7th Cir. 1990) (assuming that absolute immunity applies to caseworkers who initiate child-removal proceedings).

Tucker's application for the order initiating the case, and her journey to Indianapolis to obtain custody of the children, call



for different analysis. The application for the initial order was much like a police officer's affidavit seeking a search warrant, which we know from Malley v. Briggs, 475 U.S. 335 (1986), falls outside the cope of absolute immunity. Sallying forth to collect the children is no different from seizing evidence on the authority of a warrant, which again is covered by qualified immunity that absolute immunity only. Both Burns and Buckley reinforce the conclusion that absolute immunity does not protect the gathering of evidence, even though the acts of presenting that evidence, to (or withholding it from) the court receive greater protection. Social workers must settle for qualified immunity when taking initial custody of children. Accord, Austin v. Borel, 830 F.2d 1356, 1361-62 (5th Cir. 1987); Caldwell v. LeFaver, 928 F.2d 331 (9th Cir. 1991); Speilman



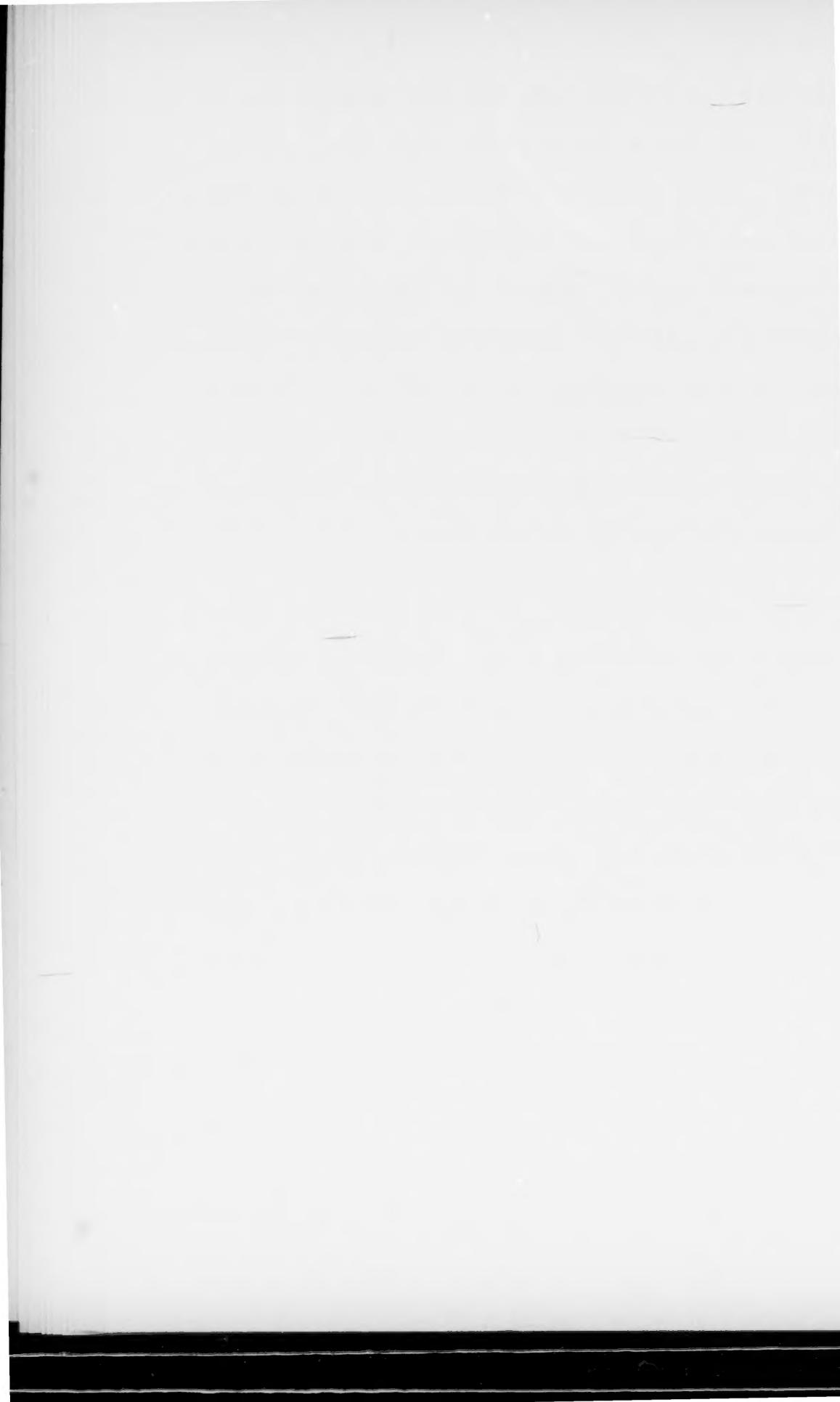
v. Hildebrand, 873 F.2d 1377, 1382-83 (105h Cir. 1989); see also K.H. v. Morgan, 914 F.2d at 854.

Still, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley, 475 U.S. at 341. See also Burns, 111 S. Ct. at 1944. This record does not establish anything of the sort, even giving the mothers the benefit of all reasonable inferences. The Department received a tip. Tucker investigated and found that the mothers' house had been stripped to the walls. The children had vanished from school. The minister who furnished food and lodging for a night in Kokomo reported that the children and their mothers had no money and no possessions except the clothes they were wearing, and that the mothers



planned to travel without any stated itinerary or means to provide for their children. That was ample basis for taking the initial steps to determine whether the children should remain in their mothers' custody. As the immunity standard under Harlow and Anderson is objective, it does not matter whether Tucker had some additional (and constitutionally dubious) reason for acting as she did.

Indeed, the removal of the children from school was sufficient by itself to support Tucker's initiative. State law required the mothers to furnish their children with an education. Ind. Code Section 20-8.1-3-33; see also Ind. Code Section 35-6-1-4(a) (depriving children of education is a Class D felony). All signs pointed to extended wandering without education for the kids. Even now the mothers do not explain how



they were going to supply the required education. The mothers' religion does not forbid education, cf. Wisconsin v. Yoder, 406 U.S. 205 (1972); the children were in public school for years. Although the mothers assert that they planned to enroll thd four in correspondence courses, they concede that they lacked the necessary funds-and they do not explain how the educational materials were going to reach them on their sojourn, characterized as it was by frequent impromptu changes of address.

Social workers often act on limited information; those who tarry, or resolve all doubts in favor of he parents, chance enduring damage to the children. Cf. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). Immunity helps social workers put their

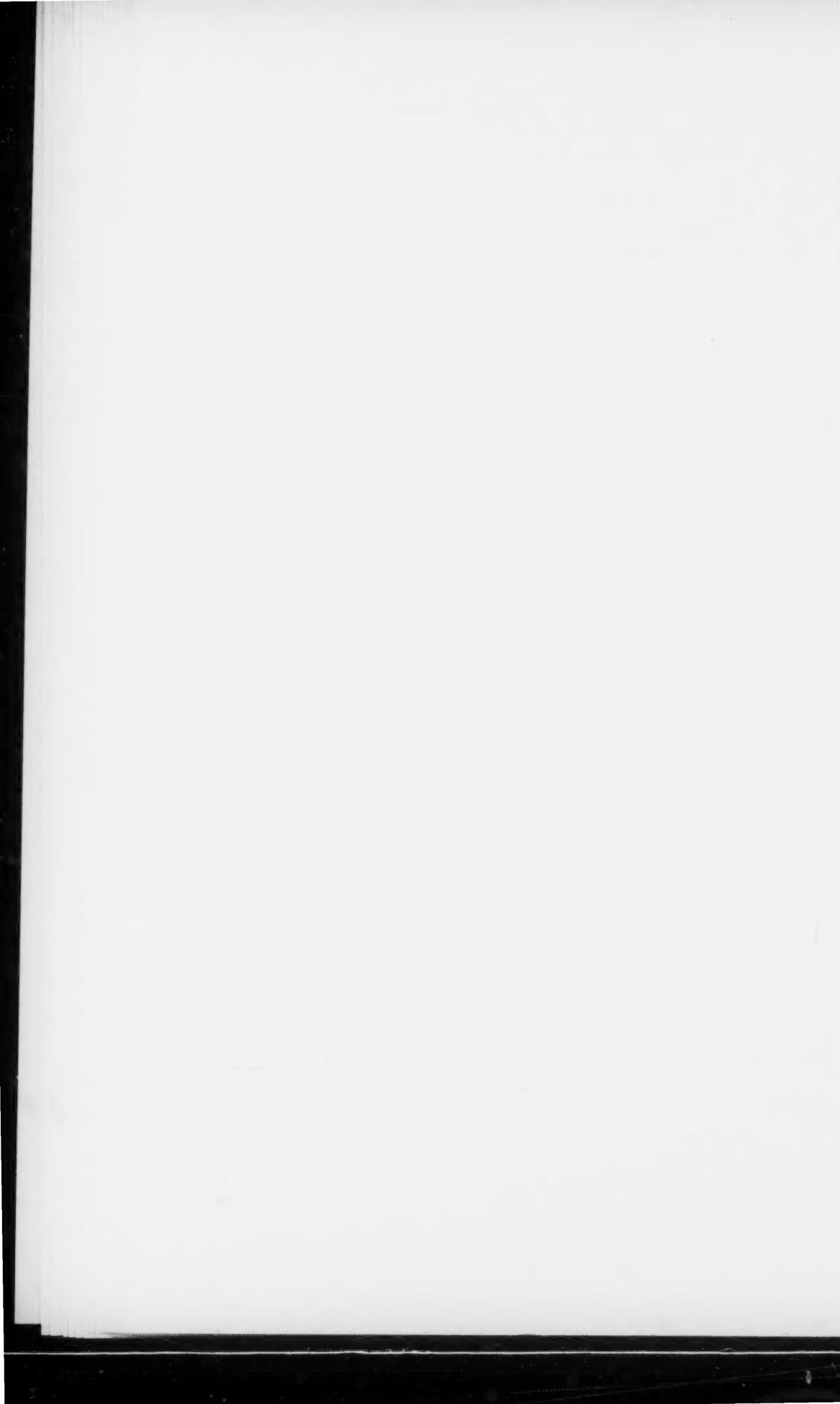


private interests aside and concentrate on the welfare of children. Unfortunately, immunity also may embolden social workers to pursue their private agendas-as the mothers say Tucker did, using her position to throttle unorthodox religious practices. One effect is inseparable from the other. Absolute immunity is appropriate when the social worker presents the case to a court, which can protect parents against misuse of public position. Knowledge that damages are unavailable induces the parties to present all arguments to that tribunal. The mothers thought that a higher duty prevented them from attending court in Indiana, but this does not require a federal court to ignore those judicial proceedings and start anew. Qualified immunity applies to the seizure of the children in Indianapolis, which would have injured the



mothers even had the state court resolved all questions in their favor. Because Tucker had an objectively reasonable basis for her acts, the judgment is AFFIRMED.

M6/m1



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

LOIS MILLSPAUGH,)
Plaintiff)) CAUSE NO. S86-53
VS.)
)
WABASH COUNTY DEPARTMENT)
OF PUBLIC WELFARE ET AL.,)
Defendants)

TINA DYSON,)
Plaintiff)) CAUSE NO. S86-54
VS.)
)
WABASH COUNTY DEPARTMENT)
OF PUBLIC WELFARE ET AL.,)
Defendants)

MEMORANDUM AND ORDER

Lois Millspaugh and Tina Dyson believe several of their constitutional rights were violated when their county welfare department took their children from them. The defendants they seek to hold liable, child welfare caseworker Manetta Tucker and

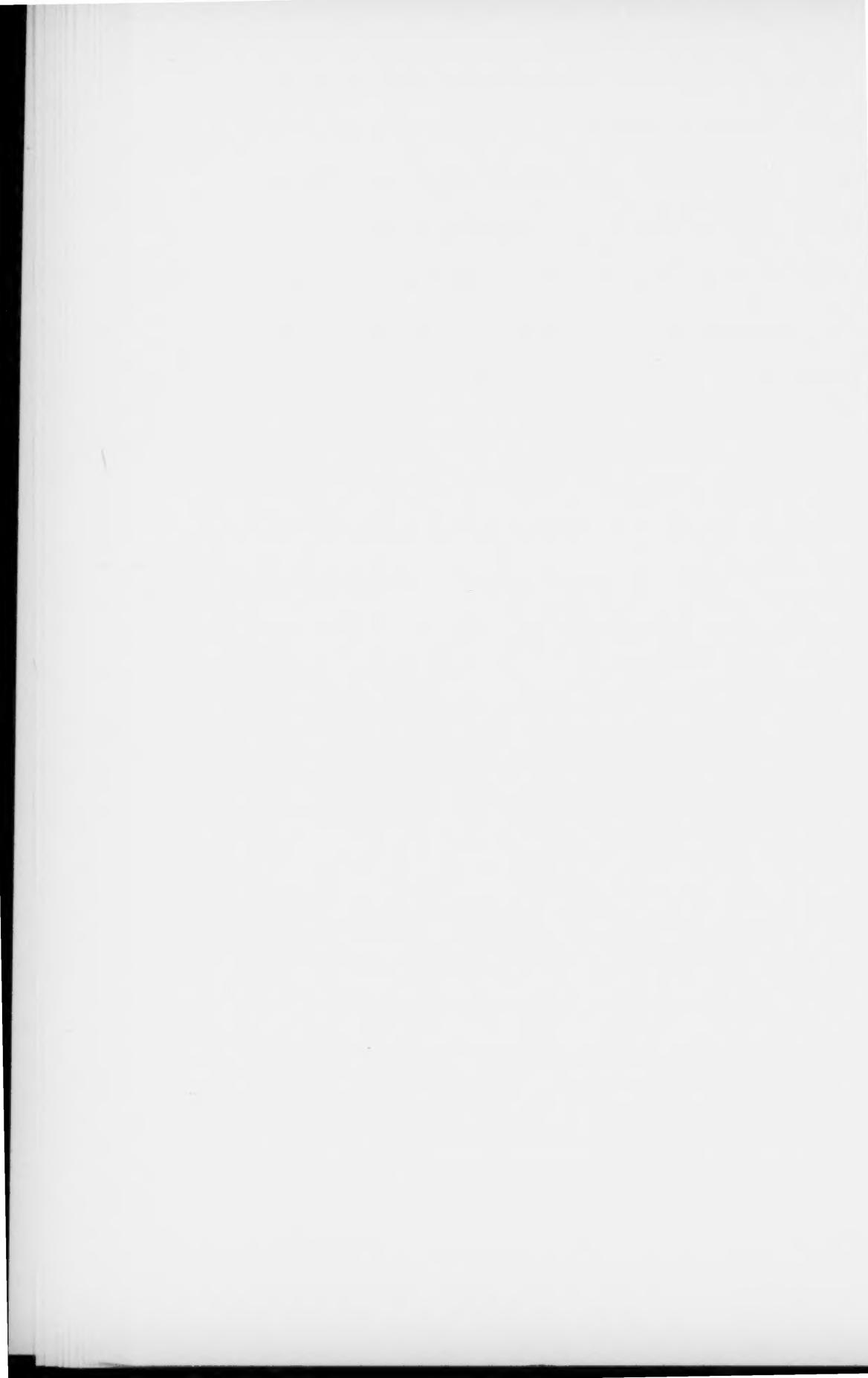


the Wabash County Department of Public Welfare ("Department"), have moved for summary judgment in separate motions, claiming entitlement to judgment on all of the plaintiffs' claims as a matter of law. Ms. Millspaugh and Ms. Dyson have responded to these motions jointly. Both sides have submitted excerpts from various discovery materials, as well as helpful legal memoranda in support of their positions. The court took the motions under advisement following oral argument on May 10, 1990.

For the reasons that follow, the court concludes that the defendants are entitled to summary judgment.

I. Facts

The events leading to these causes surround two child in need of services ("CHINS") actions, see IND. CODE 31-6-4-10, involving



the plaintiffs' then-minor daughters, Jean and Paula Millspaugh and Vicki and Renee Dyson, initiated by the Department and Ms. Tucker. During 1984, when the CHINS actions were commenced, Ms. Tucker was employed by the Department to investigate, institute, and process CHINS proceedings.

From approximately September or October, 1982 until early 1984, the plaintiffs lived in Wabash, Indiana and the four children attended public school in that county. The Millspaughs and Dysons apparently resided with Ms. Jewell McLaughlin, leader of Faith Ministries, the religious group of which they are members, in a home on Sivey Street. The plaintiffs report that Faith Ministries is incorporated under the laws of the State of Indiana and that the group's religious beliefs include the following: that God will provide all



necessities and that His followers will, therefore, take employment upon His direction; belief in prayer for physical healing and administration of medical care only when necessary; placement of little value on worldly possessions except that it is better to give than to receive; and a basic, general belief that all actions should be taken at God's direction. The group engages in religious activities such as fasting, prayer, and homage by lengthy travels.

On February 4, 1984, the plaintiffs left the Sivey Street home with their children, allegedly "stripping" the residence of all possessions and rendering it

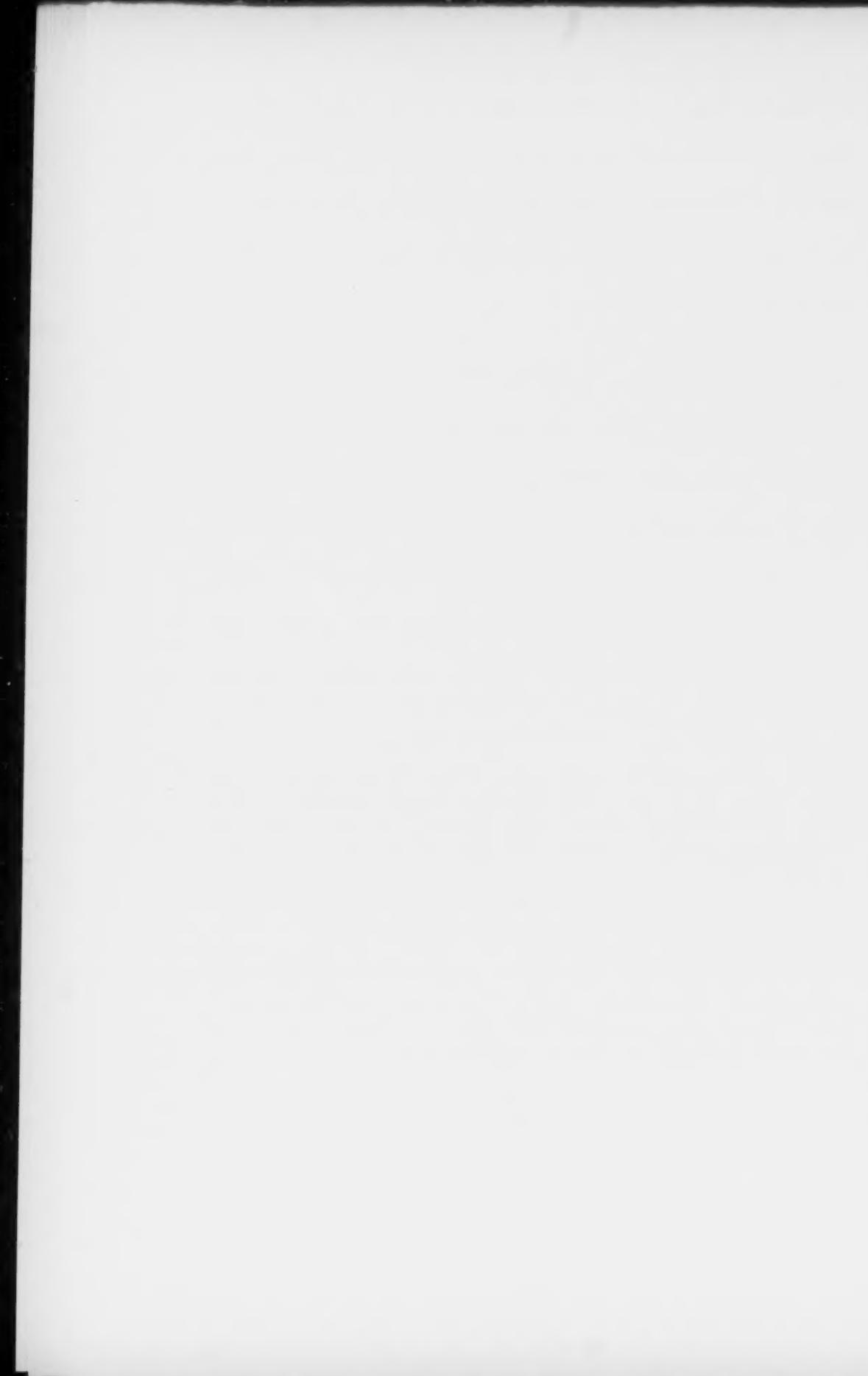


uninhabitable.¹ The plaintiffs took their families to Kokomo, Indiana, where Rev. Bob Merrill housed them, and then to Indianapolis where they stayed with family of Ms. McLaughlin.

The Department reports first learning that the children were potential subjects of a CHINS petition through an anonymous phone call received on February 2, 1984, indicating that the children "were hungry".² The Department began an investigation into the plaintiffs' care of their children which

¹The defendants explain this "stripping" as the removal of fixtures, appliances, and all furniture from the home, rendering it uninhabitable. The plaintiffs report that these actions were done in preparation for remodeling of the home to be completed in the future.

²The plaintiffs contend that the Department had been watching them for some time before the call was received. No evidence in the record supports this assertion.



uncovered: (1) the condition of the residence; (2) the plaintiffs' membership in the Faith Ministries; (3) the daughters' removal from school without any notice; and (4) the plaintiffs' departure to Kokomo to see a Rev. Bob Merrill. Ms. Tucker worked on the case with Judy Mason. She reports visiting the house on Sivey Street, speaking with school administrators and Rev. Merrill, contacting the local Wabash newspaper, neighbors, and other members of the community to inquire about the care the plaintiffs provided for their children. Rev. Merrill told Ms. Tucker that the plaintiffs arrived in Kokomo with the children with no luggage, money, or plans for accommodations.

On February 8, Ms. Tucker and Department Attorney Steve Downs filed a CHINS petition alleging that the Dyson and Millspaugh



children were in need of services and, on that same day, Wabash Circuit Court Judge Lynn Ford issued a detention order to take the children into custody. That evening, the Indianapolis police took the children into custody upon presentation of the detention papers to the plaintiffs. The detention papers contained a notice of the detention hearing on February 10 at 9:00 a.m., but neither plaintiff reports seeing that notice, and the mothers were not given copies of the papers. Neither mother appeared at the February 10 detention hearing in Wabash, at which Judge Ford found that the girls required continued detention until further court proceedings, which he scheduled for March.

When the children first were taken into custody, Ms. Tucker went to Indianapolis with an acquaintance of the plaintiffs,



Paul Wildridge, and brought the children back to Wabash. Dr. James McCann, who examined the four children upon their return to Wabash, reports that the children were generally healthy and well. Gerald Goldstone, a clinical psychologist, later examined the children and found no emotional or psychological problems other than certain religious views, which he described as unusual, but existent in a minority of the community.

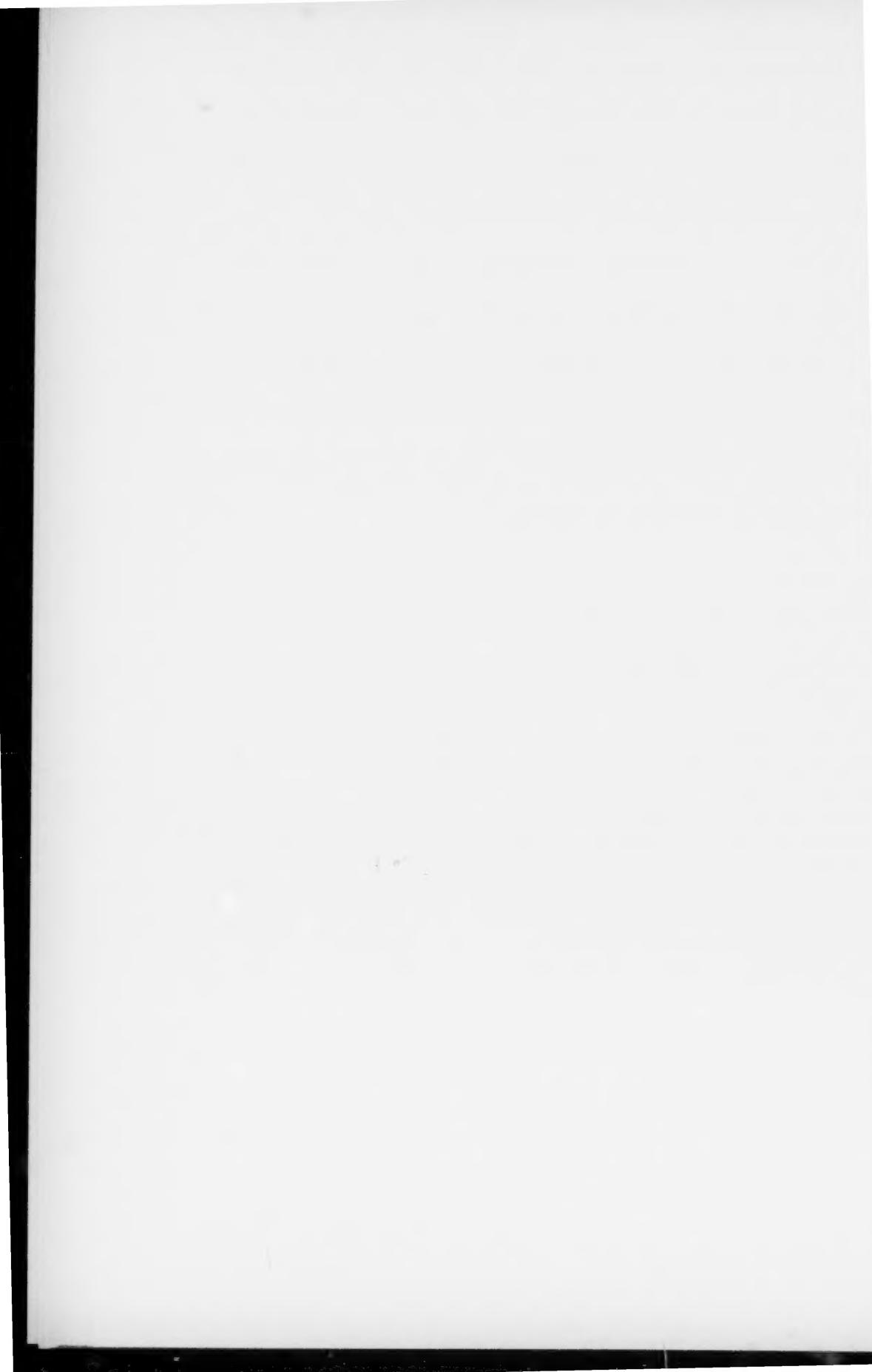
Meanwhile, the plaintiffs left Indianapolis on February 9, traveled to Seymour, Indiana for three days, then to Cleveland, Tennessee, where they stayed until around March 7. Ms. Millspaugh reportedly had a telephone conversation with Ms. Tucker on February 17 in which she informed Ms. Tucker that they were traveling under God's direction and that they could receive



messages through a Paul Wildridge. The plaintiffs then went to Ohio, Virginia, Tennessee, North Carolina, Florida, and several suburbs of Washington, D.C.³ The plaintiffs report several conversations with Mr. Wildridge in which he was unable to give any information concerning the Department's proceedings; the plaintiffs contend that Ms. Tucker failed to contact Mr. Wildridge as request.⁴

³During their travels through these states, the plaintiffs stayed in an umber of places, stopping for periods of time upon God's direction.

⁴The record reveals that the plaintiffs named Mr. Wildridge as their designated agent for the Department to contact regarding their daughters during the mothers' absence from Wabash. The defendants report sending notices to Mr. Wildridge, while the plaintiffs argue that the notice was never received. The record seems to support both positions. Apparently, notices to Mr. Wildridge were returned unserved.



An initial hearing was set in the Millspaugh and Dyson CHINS cases for March 16, and a fact-finding hearing was set for March 23. Notice and summonses were supposedly sent to the plaintiffs through Mr. Wildridge. The plaintiffs, however, report hearing about the court proceedings in early March; they further state that they could not attend because they were on a mission for God and it was not the direction He had given. Lois Millspaugh spoke with Ms. Tucker about the hearing by telephone on March 16.

At the hearing, Judge Ford found that the plaintiffs had actual notice of the hearing and had failed to appear. Charles Millspaugh⁵ appeared at the March 16 hearing

⁵Charles Millspaugh is the father of Jean and Paula; he resides in Lincoln, Nebraska. The Millspaughs were divorced and Lois received custody of the two children.



and denied that his daughters were children in need of services. At Mr. Millspaugh's request, the judge reset the fact-finding hearing in his children's case for April 27. Both plaintiffs contacted Ms. Tucker to find out what had happened at the March 16 hearing; Lois Millspaugh called on March 16 and Tina Dyson on March 19. Ms. Tucker reports telling them the nature of the proceedings, that their absence had been noted, and of the next scheduled proceedings and the need for them to attend. The plaintiffs generally report either no knowledge of subsequent proceedings or insufficient notice.

On March 23, a fact-finding hearing was held in the Dyson children's case; Tina



Dyson did not appear.⁶ Judge Ford held that Renee and Vicki Dyson were children in need of services, and set a disposition hearing for May 4. On April 27, a fact-finding was held in the Millspaugh children's case; Lois Millspaugh did not appear. Judge Ford took the matter under advisement pending the report of a study of Mr. Millspaugh's home. The record does not suggest that either plaintiff contacted the Department of the county court to find out what had happened at these hearings.

Lois Millspaugh returned from her travels with Jewell McLaughlin⁷ on May 17; begin-

⁶The father of the Dyson children is Terry Callicoat, whereabouts and marital status unknown. Tina and Terry have an older daughter, Amy, who lives with Tina's parents. Amy supposedly disliked living with her mother and was, therefore, permitted to stay with her grandparents.

⁷Tina Dyson did not return to Indiana at this time.



ning on May 20, Ms. Millspaugh stayed in Marion, Indiana. She contacted the Department and arranged to meet with her daughters on May 25. Ms. Millspaugh also met with Ms. Tucker on May 25. Ms. Tucker reports telling Ms. Millspaugh that she must get a job and have a stable home to get her daughters back and that she showed Ms. Millspaugh the case plan prepared in her daughters' case. Ms. Millspaugh denies seeing the plan. On May 25, Ms. Millspaugh also accompanied Jewell McLaughlin to the office of attorney John Johnston regarding a problem that Ms. McLaughlin was having with her house. Lois Millspaugh did not engage Mr. Johnston's services at that time.

Ms. Millspaugh left the Wabash-Marion area on May 26, stayed in Seymour, Indiana for a



few days and then traveled east, living in various parts of Virginia and Washington, D.C. in June. At the same time, Tina Dyson was also traveling in various parts of Virginia and Washington, D.C. The traveling apparently continued until the fall of 1984. In November, a trip abroad was planned, but eventually abandoned. Throughout this time Lois Millspaugh reports certain Divine directions concerning her travels and the care of her children: there was no need to call after the April 27 hearing; she must continue to travel as was God's direction; and her children would be provided for and be returned to her at God's direction.

Both mothers contend that their daughters were always well-fed were kept clean and neat, had clothes to wear, and always had beds to sleep on while in their mothers'



care. They state that all children and adults at the Sivey Street house were well-nourished and clean. The plaintiffs further state that the children attended public school in Wabash and received good grades⁸ and that their academic success resulted from their religious studies and training. The plaintiffs report their intention of enrolling the children in correspondence school during their religious travels, but concede they had no money for that purpose.⁹ The mothers also assert being "watched" by the Department and attack the accuracy of information gathered by the Department concerning their

⁸Jean Millspaugh was first in her class in high school, completing her studies in only three years.

⁹The Dyson and Millspaugh families left Wabash with only the clothes on their back, having given everything else away during the previous week.



religious practices.

Lois Millspaugh and Tina Dyson first employed John Johnston to represent them to regain custody of their daughters in October, 1984.

On November 29, 1984, the Wabash Circuit Court received a home study on Charles Millspaugh. Dispositional hearings were then scheduled for both the Millspaugh and Dyson cases for December 14 at 11:00 a.m.; notices of these hearings were apparently sent to the mothers by way of a Maryland address. On December 13, Mr. Johnston appeared for the plaintiffs and moved for a change of judge. On December 14, the court set aside its previous determinations and scheduled a detention hearing in both cases for December 17. At that hearing, Judge Ford found that the plaintiffs should have been served with notice by publication,

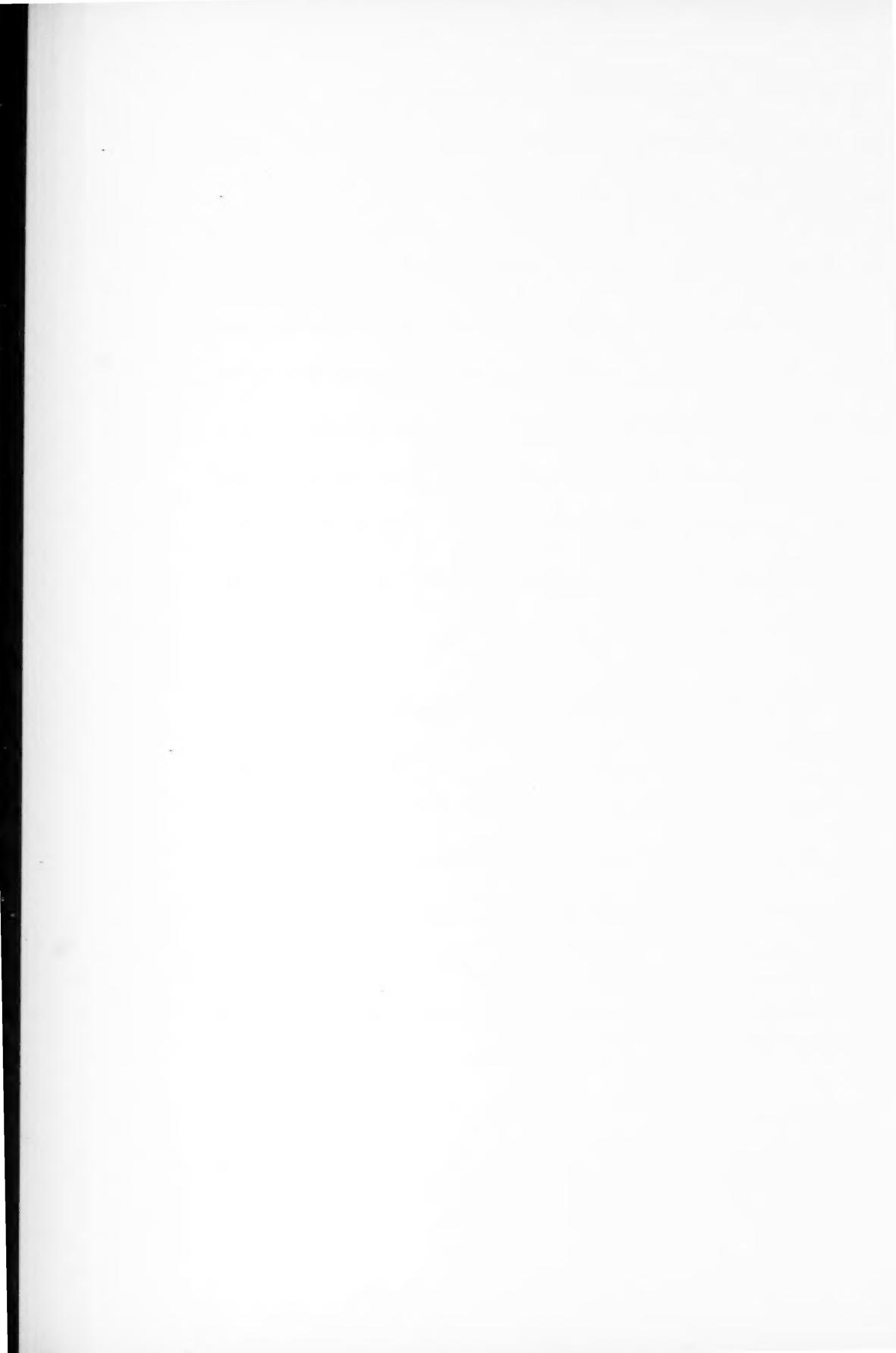


reverted the CHINS proceedings to the initial hearing stage, and granted the motion for change of judge.

On January 2, 1985, Judge Thomas Wright assumed jurisdiction of the cases, and on July 8, 1985, Judge Wright reversed the detention orders previously entered, remanding Paula Millspaugh¹⁰, Vicki and Renee Dyson to their mothers. The Indiana Court of Appeals upheld Judge Wright's ruling on December 17, 1986.

The plaintiffs' travels resumed during the pendency of the new case. Lois Millspaugh traveled between December 31, 1984 and January 6, 1985 to Switzerland with Jewell McLaughlin. On February 12, Lois Mill-

¹⁰By that time, Jean Millspaugh was 18 years old.



spaugh and Tina Dyson traveled with Ms. McLaughlin abroad, visiting England, France, Switzerland, Italy, Greece, and Jerusalem. Tina Dyson returned to Wabash in May; Lois Millspaugh continued traveling to Tel Aviv, Amsterdam, Athens, Bangkok, Seoul, Honolulu, and Waikiki Beach.

Lois Millspaugh was in Waikiki Beach when she learned from Mr. Johnston that she had won custody of her daughter and would have thirty days to pick her up. Several days later, Ms. Millspaugh left Waikiki Beach and went first to Silver Springs, Maryland, where she stayed several more days before leaving for Wabash on July 19, 1985. She took custody of Paula on July 22, 1985. Paula ran away from her mother eighteen days later and went to Lafayette, Indiana to her former foster parents, Mr. and Mrs. Schrader. Proceedings then began in the



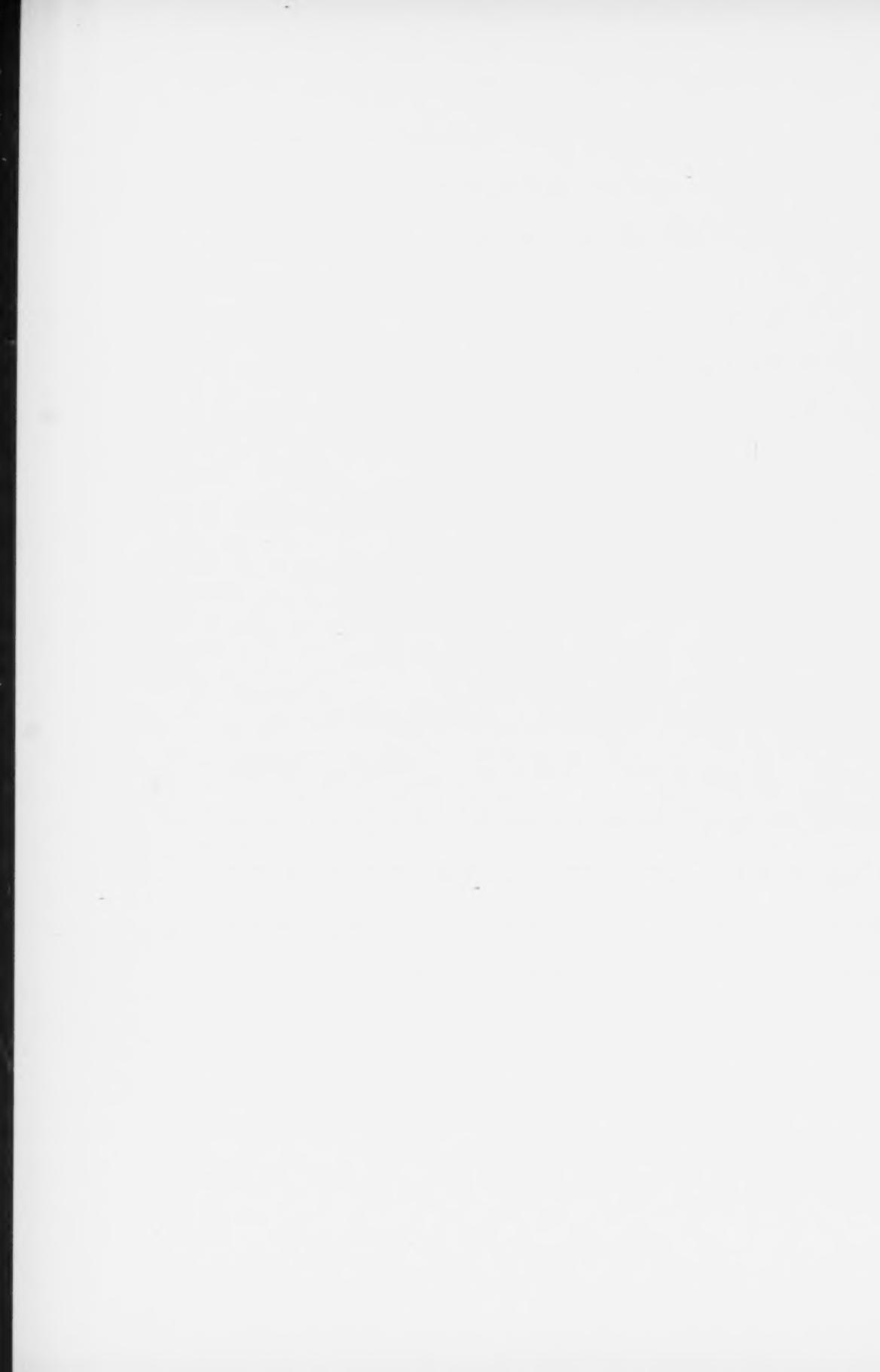
Lafayette courts where the Lafayette Department of Welfare took custody of Paula. The Lafayette court determined that Paula should be returned to her mother.

Vicki Dyson also expressed a desire to return to her foster parents, the Driesens, and not remain the with plaintiffs when they resumed their residence on Sivey Street in Wabash. ms. Dyson reportedly allowed Vicki to return to the Driesens.

II. Procedural History

Ms. Millspaugh and Ms. Dyson have brought nearly identical actions alleging that their federal constitutional and statutory rights were violated by the defendants' actions with respect to their daughters. These actions have been consolidated for disposition before this court.

The plaintiffs have asserted a broad range



of violations of federal constitutional laws and statutes. They seek relief under U.S.C. Subsection 1983, 1985 and 671(a). As the court understands the claims contained in the one-count complaint, they plaintiffs assert two due process claims: first, that the defendants acted illegally in permitting the plaintiffs' daughters' detention based on insufficient, incredible, and unreliable evidence in the preliminary inquiries and affidavits, which evidence did not establish by probable cause that the plaintiffs' children were children in need of services; and second, that they received insufficient notice of the proceedings concerning their daughters and that no service of process was ever personally received nor was publication made by the defendants.

The plaintiffs contend that the defendants



violated the First Amendment in three respects. First, the plaintiffs' rights to exercise their religious beliefs were violated by the alienation of their children from their religion and placement in a different environment. The plaintiffs allege that the defendants violated the Establishment Clause by interfering with their religious beliefs. Finally, the plaintiffs contend that defendants violated their right to association by preventing them from seeing their children. The plaintiffs also allege that the defendants violated the Fourth Amendment by seizing the children illegally, and further claim that the defendants interfered with their fundamental right to raise their families.

The plaintiffs also allege that the defendants violated 42 U.S.C. Section 671(a) by failing to develop a written case plan



describing the basis for the children's removal.¹¹

III. Standard of Review for Summary Judgment

A party seeking summary judgment must demonstrate that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(e); Hannon v. Turnage, 892 F2d 653, 656 (7th Cir. 1990). If that showing is made and the motion's opponent would bear the burden at a trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute.

¹¹The plaintiffs conceded at the hearing on the motion that their earlier claim under 42 U.S.C. Section 1981 could not stand.



Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Whetstine v. Gates Rubber Co., 895 F.2d 388, 392 (7th Cir. 1990). If he fails to do so, summary judgment is proper. National Diamond Syndicate, Inc. v. UPS, 897 F.2d 253, 260 (7th Cir. 1990). A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990). Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Krist v. Eli Lilly and Co., 897 F.2d 293, 296 (7th Cir. 1990).

The parties cannot rest on mere allegations in the pleadings, Koclanakis v. Merrimack Mut. Fire Ins. Co., 899 F.2d 673, 675 (7th Cir. 1990), or upon conclusory allegations



in affidavits. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989); First Commodity Traders v. Heinold Commodities, 766 F.2d 1007, 1011 (7th Cir. 1985). The court must draw any permissible inferences from the materials before it in favor of the non-moving party, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Johnson v. Pelker, 891 F.2d 136, 138 (7th Cir. 1989), as long as the inferences are reasonable. Spring v. Sheboygan Area School District, 865 F.2d 883, 886 (7th Cir. 1989). The non-moving party must show that the disputed fact is material, or outcome-determinative, under applicable law. Local 1545, United Mine Workers v. Inland Steel Coal Co., 876 F.2d 1288, 1293 (7th Cir. 1989).

IV. Ms. Tucker's Motion for Summary Judgment

A. Parties' Arguments



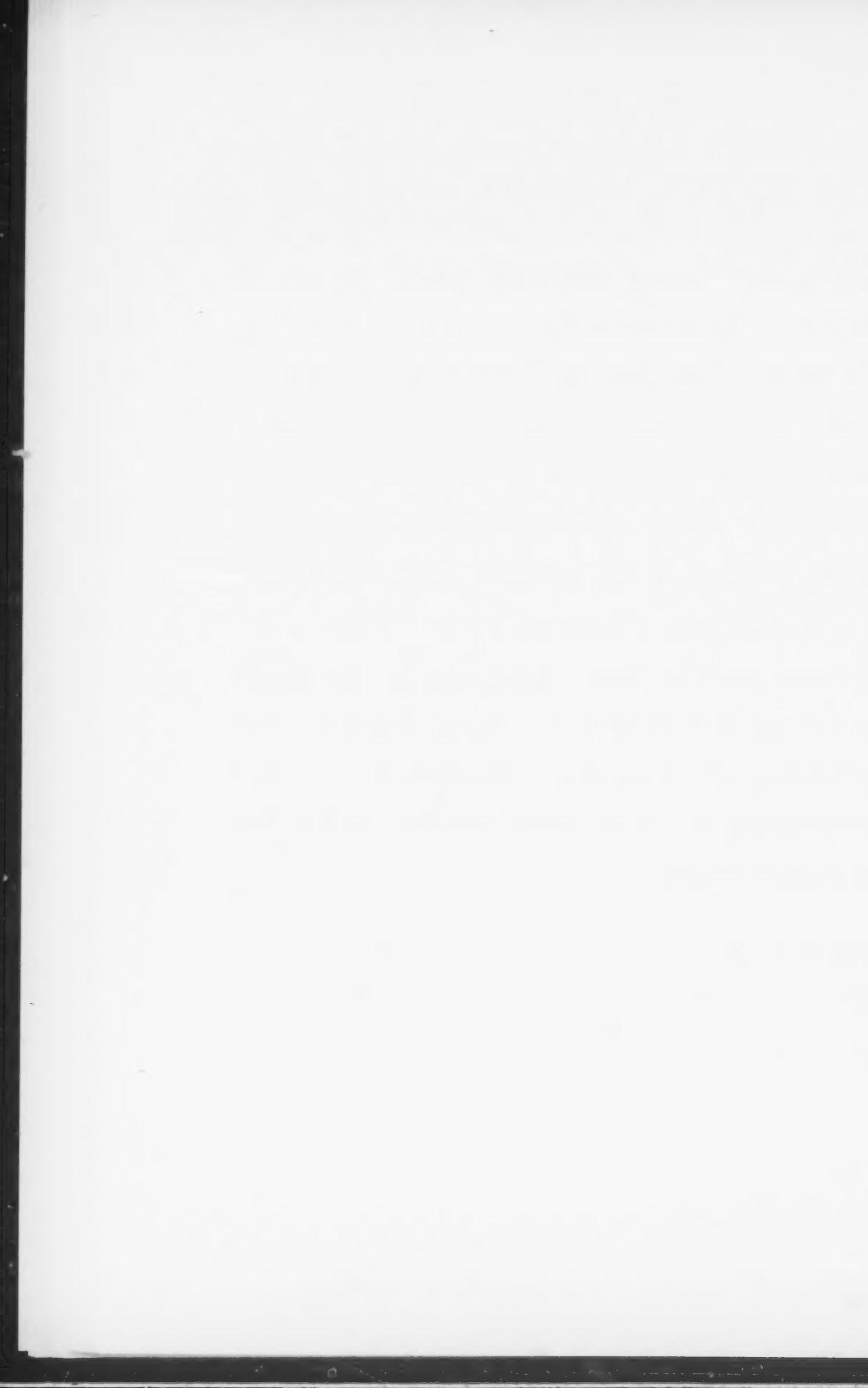
Ms. Tucker's grounds for summary judgment travel two basic avenues. She argues that as a CHINS caseworker she is immune from liability under either an absolute or qualified immunity theory and, alternatively, that CHINS caseworkers cannot be held liable for decisions made by other administrators or judicial authorities. She further argues that summary judgment is appropriate in her favor since: (1) the plaintiffs cannot demonstrate causation because their own actions of failing to be present at the hearings (waiving the right to be heard) were the proximate cause of any alleged damages or deprivations; (2) the plaintiffs did not first exhaust state remedies; (3) the plaintiffs can show, at most, that the defendants were merely negligent in failing to give sufficient notice; and (4) the plaintiffs have no



First Amendment religion claim since the government had a legitimate interest in this case.

Ms. Tucker cites numerous cases in which CHINS caseworkers (or similar administrators dealing with child abuse or welfare services, juvenile officers) were found to be absolutely immune from suit as quasi-judicial officers. As Ms. Tucker notes, though, the Seventh Circuit apparently has not ruled on this issue. Ms. Tucker asserts that Ashbrook v. Hoffman, 617 F.2d 474 (7th Cir. 1980), permits the granting of absolute immunity to similar individuals integrally related with the judicial process.

The plaintiffs refer the court to Malley v. Briggs, 475 U.S. 335 (1986), in which a police officer testifying before a



magistrate was granted qualified immunity. Ms. Tucker, however, cites several post-Malley cases that continue to grant CHINS caseworkers absolute immunity, distinguishing Malley. The plaintiffs principally comment on the lack of probable cause for Ms. Tucker to have proceeded with detention, the negligent or reckless conduct of the investigation, and the various rights of the plaintiffs (and their children) that have been violated. Few of the plaintiffs' comments deal directly with the thrust of the Ms. Tucker's position asserting immunity from prosecution. The defense of immunity presents the strongest basis for summary judgment in Ms. Tucker's favor, and it is on this ground that the court finds such judgment appropriate.

<u>B.</u>	<u>Applicable</u>	<u>Law</u>
1. <u>Nature of Immunity</u>		



Some circuits have recognized the absolute immunity of social welfare workers, Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989); Vosburg v. Dept. of Social Services, 884 F.2d 133 (4th Cir. 1989); Malachowski v. City of Keene, 787 F.2d 704 (1st Cir.) cert. denied 479 U.S. 828 (1986); Fanning v. Montgomery County Children & Youth Services, 702 F. Supp. 1184 (E.D. Pa. 1988); Donald M. v. Matava, 668 F. Supp. 703 (D. Mass. 1987); Fogle v. Benton County SCAN, 665 F. Supp. 729 (W.D. Ark. 1987); Whelehan v. Monroe County, 558 F. Supp. 1093 (W.D.N.Y. 1983), while other courts have given qualified immunity to those administrative and investigative functions of case workers, Babcock v. Taylor, 884 F.2d 497 (9th Cir. 1989) cert. denied 110 S.Ct. 1118 (1990); J.H.H. v. O'Hara, 878 F.2d 240 (8th Cir. 1989) cert. denied 110



S.Ct. 1117 (1990); Hodorowski v. Ray, 844 F.2d 1210 (5th Cir. 1988); Austin v. Borel, 830 F.2d 1356 (3rd Cir. 1987); Bendiburg v. Dempsey, 707 F. Supp. 1318 (N.D. Ga. 1989); Snell v. Tunnell, 698 F. Supp. 1542 (W.D. Okla. 1988); Reynolds by Reynolds v. Strunk, 688 F. Supp. 950 (S.D.N.Y. 1988); Whitcomb v. Jefferson County Dept. of Social Services, 685 F. Supp. 745 (D. Colo. 1987).

The Seventh Circuit has not definitively determined the type of immunity, if any, to be afforded county social workers engaged in child protective proceedings. The Seventh Circuit generally relies on a functional distinction in determining the type of immunity afforded various governmental officials. In Henderson v. Lopez, 790 F.2d 44 (7th Cir. 1986), the court explained that a governmental offi-



cial's quasi-judicial functions executed before or adjacent to court proceedings were given absolute immunity while those investigatory or administrative functions were given only qualified immunity. 790 F.2d at 46; see also Butz v. Economou, 438 U.S. 478 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976). Since the tasks of child welfare workers can be quasi-judicial, yet often originate on an administrative or investigative level, the courts of this circuit appear to permit such officials to assert qualified immunity against civil actions. Langstrom v. Illinois Department of Children & Family Services, 892 F.2d 670 (7th Cir. 1990) (social worker and school personnel entitled to qualified immunity in suit brought by students and their parents alleging violations of constitutional rights during a child abuse investigation); Doe v. Bobbitt, 881 F.2d 510 (7th Cir.



1989) cert. denied 110 S.Ct. 2560 (1990) (upholding summary judgment in favor of employees of the Illinois Department of Children and Family Services in suit a challenging children's placement in foster care home); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) (Illinois Department of Children & Family Services employees entitled to qualified immunity in action by parents alleging illegality of physical exam conducted in investigation of child abuse claim); Navis v. Fond du Lac County, 721 F. Supp. 182 (E.D. Wis. 1989) (social worker entitled to qualified immunity in her efforts toward achieving children's removal from natural parents).

Because that circuit has recognized only qualified immunity, and not absolute immunity, for child welfare workers, the court concludes that Ms. Tucker may assert



a defense of qualified immunity in these actions. She may be entitled to claim absolute immunity, particularly with respect to conduct relating to the judicial proceedings rather than her investigation, but it is not necessary for this court to become the first within this circuit to so hold. Her qualified immunity, even if she is entitled to no greater immunity, is sufficient to allow her to prevail.

2. Qualified Immunity

The defense of qualified immunity only protects a governmental official in certain contexts. Under the doctrine of qualified immunity, public officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which

a reasonable person would have known. Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982). In determining whether an official is entitled to qualified immunity, the courts of this circuit consider whether the challenged actions were objectively reasonable in light of the rights of the parties involved, Alvarado v. Picur, 859 F.2d 448 (7th Cir. 1988); Simkunas v. Tardi, 720 F. Supp. 687 (N.D. Ill. 1989); Navis v. Fond du Lac County, 721 F. Supp. 182 (E.D. Wis. 1989); Woods v. City of Michigan City, Ind., 685 F. Supp. 1457 (N.D. Ind. 1988), and to whether the allegedly violated rights were "clearly established" at the time of the events in question. Hedge v. County of Tippecanoe, 890 F.2d 4 (7th Cir. 1989); Schertz v. Waupaca County, 875 F.2d 578 (7th Cir. 1989); Doe v. Bobbitt, 881 F.2d at 511.



Because analysis of a qualified immunity claim is ostensibly objective, the issue is properly resolved on summary judgment.

Polenz v. Parrott, 883 F.2d 551 (7th Cir. 1989); Rakovich v. Wade, 850 F.2d 1180 (7th Cir. 1988) (en banc); Hedge v. County of Tippecanoe, 890 F.2d at 7; Schertz v. Waupaca County, 875 F.2d at 582-583. Although intertwined with a case's facts, the qualified immunity issue is a question of law for the court. Alvarado v. Picur, 859 F.2d at 450; Simkunas v. Tardi, 720 F. Supp. at 690; Woods v. City of Michigan City, Indiana, 685 F. Supp. at 1460.

When confronting a qualified immunity claim, a district court must undertake a two-part analysis: first, whether the alleged conduct set out a constitutional violation; and second, whether the



constitutional standards were clearly established at the time of the alleged violation. Auriemma v. Price, 895 F.2d 338, 342 (7th Cir. 1990); Rakovich v. Wade, 804 F.2d at 70. In addressing the second part of the inquiry, the court must determine whether the rights were clearly established in a particularized sense; the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." Anderson v. Creighton, 483 U.S. 635, 640 (1986).

The plaintiffs bear the burden of establishing the existence of the established right, Abel v. Miller, 824 F.2d 1522, 1534 (7th Cir. 1987), by pointing to closely analogous cases or other relevant decisional law decided before the conduct at issue. Doe v. Bobbitt, 881 F.2d at 511; Powers v.



Lightner, 820 F.2d 818, 821 (7th Cir. 1987) cert. denied 484 U.S. 1078 (1988). The plaintiffs need not point to identical cases, Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989); Lojuk v. Johnson, 770 F.2d 619, 628 (7th Cir. 1985) cert. denied 474 U.S. 1067 (1986), or even to binding precedent. Rakovich v. Wade, 850 F.2d at 1209-1210. The plaintiffs must, however, come forth with authorities to demonstrate the existence of a sufficient consensus indicating that the challenged conduct was unlawful. Landstrom v. Illinois Dept. of Children & Family Services, 892 F.2d at 670. With these standards in mind, the court turns to the cases cited by the plaintiff. The structure of the plaintiffs' summary judgment argument is such that the court must discuss each of the principle cases the plaintiffs cite in support of their claims. None of those



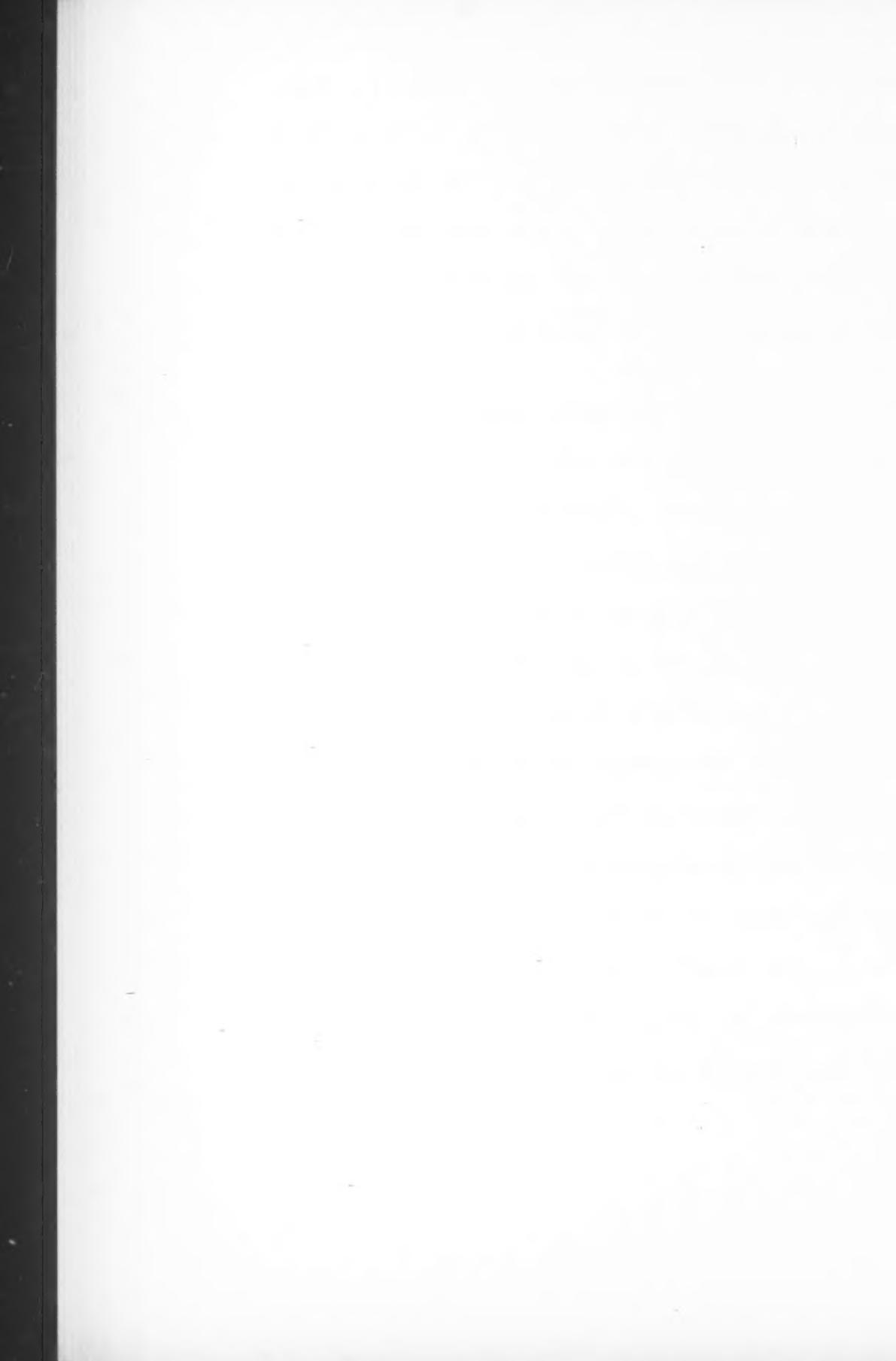
cases, however, set forth a clearly defined constitutional right that Ms. Tucker may be found to have violated.

Smith v. Organization of Foster Families, 431 U.S. 816 (1977), addressed the predeprivation procedures afforded to foster families before foster children may be removed from their homes. Although the case contains language, quoted by the plaintiffs, concerning the protections afforded the private realm of family life, 431 U.S. at 842, the case's holding addresses none of the alleged wrongdoing by Ms. Tucker. The facts of Lassiter v. Department of Social Services, 452 U.S. 18 (1981), were closer to the case at bar. Lassiter involved the termination of parental rights; the only issue addressed, however, was whether counsel should have been appointed for the indigent parent, an



issue not involved here. Similarly, Santosky v. Kramer, 455 U.S. 745 (182), held that parental rights may not be terminated save upon a showing of clear and convincing evidence, but Ms. Tucker is not claimed to have violated that evidentiary standard.

The plaintiffs accurately quote Lossman v. Pekarske, 707 F.2d 288, 290 (7th Cir. 1983), as saying, "Lossman's liberty unquestionably includes the custody that state law gave him of his minor children", but the case' holding affords far less support. The court held that Lossman had demonstrated no damage because his children had been returned to him, and that an adversarial predeprivation hearing is not required when a child's safety is threatened. The court does not understand Ms. Millspaugh or Ms. Dyson to contend that they were entitled to an adversarial hear-



ing before the children were taken.

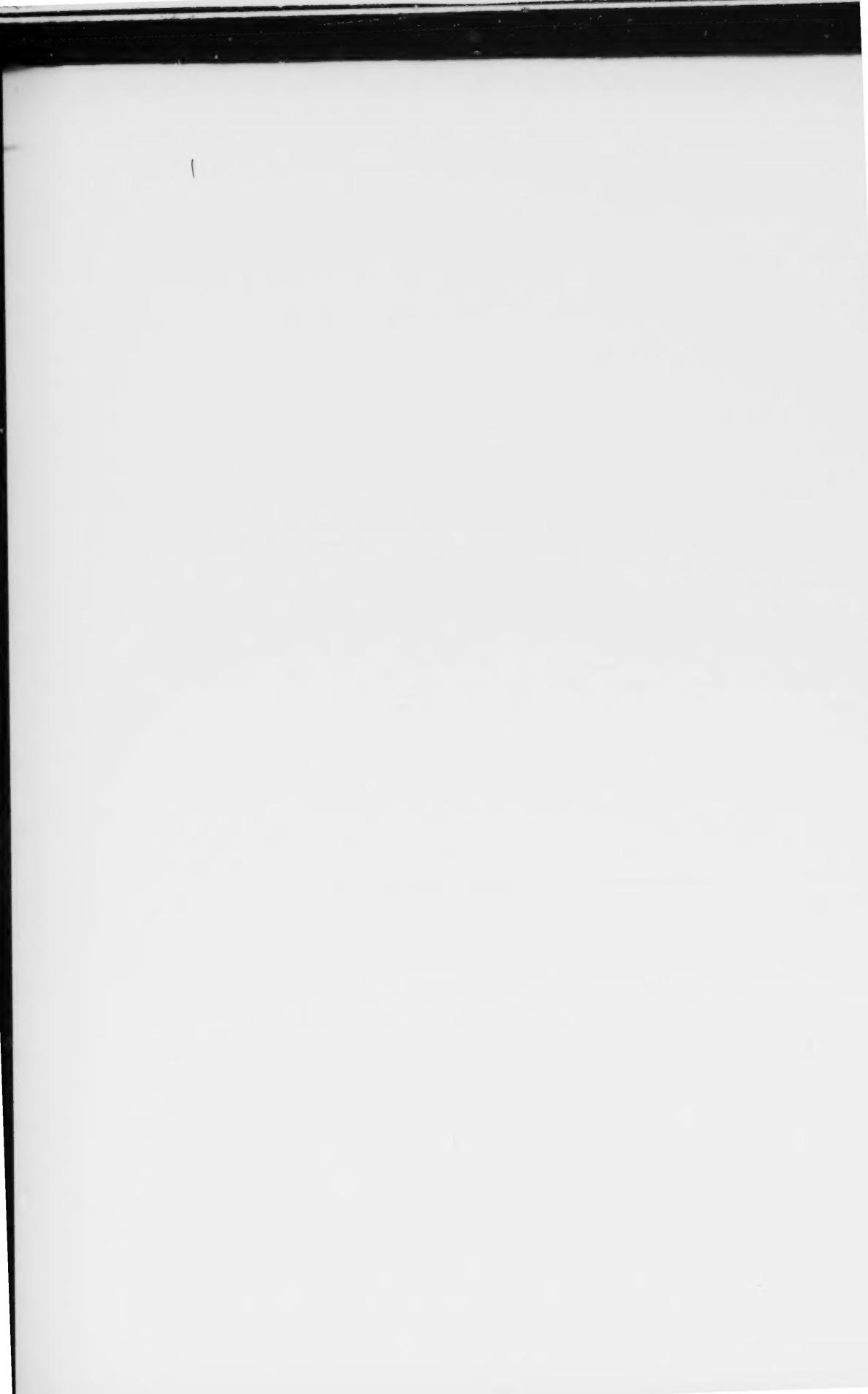
Malley v. Briggs, 475 U.S. 335 (1986), and Illinois v. Gates, 462 U.S. 213 (1983), the only cases the plaintiffs cite in their Fourth Amendment discussion, say nothing of the grounds on which social workers may act to seek emergency detention of children thought to be in need of services.

The plaintiffs also cite the Eleventh Circuit's en banc decision in Taylor by and Through Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) cert. denied 109 S.Ct. 1337 (1989), but that case affords no support for two reasons. First, the case's holding addressed the "circumstances, if any, [under which] a child involuntarily placed in a foster home may successfully bring an action in federal court against the state officials involved in the



placement, for injuries sustained while in the foster home." 818 F.2d at 792. No injuries to the Millspaugh or Dyson children are alleged here.¹² Second, Taylor was decided in 1987, well after the events

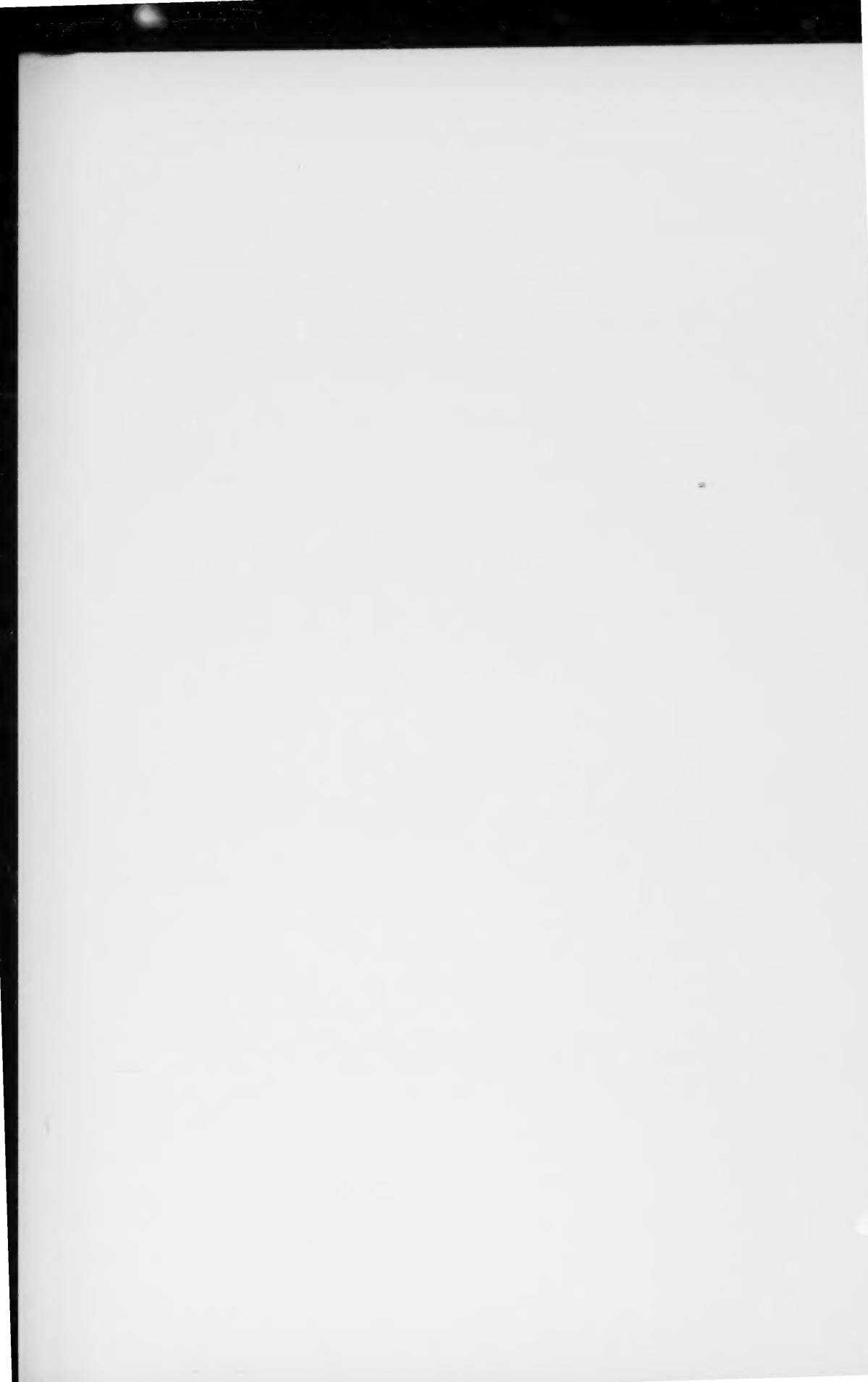
¹²Similarly, Doe v. New York Dept. of Social Services, 649 F.2d 134 (2nd Cir. 1981), op'n foll'g remand 709 F.2d 782 (2nd Cir.), cert. denied 464 U.S. 864 (1983), addressed the defendants' failure to remove a child from a foster home after reports of sexual abuse.



at issue here.¹³

In Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977), the court held that a mother whose child was taken by welfare workers had a due process right to a judicial hearing when the children continued to be held over her objection. The court held that the defendants' original taking of the children did not offend due process, because an emergency existed as a result of the mother's psychiatric commitment. Once that emergency passed, however, the mother was entitled to a hearing. Ms. Tucker, unlike the defendants in Duchesne, did not attempt to hold

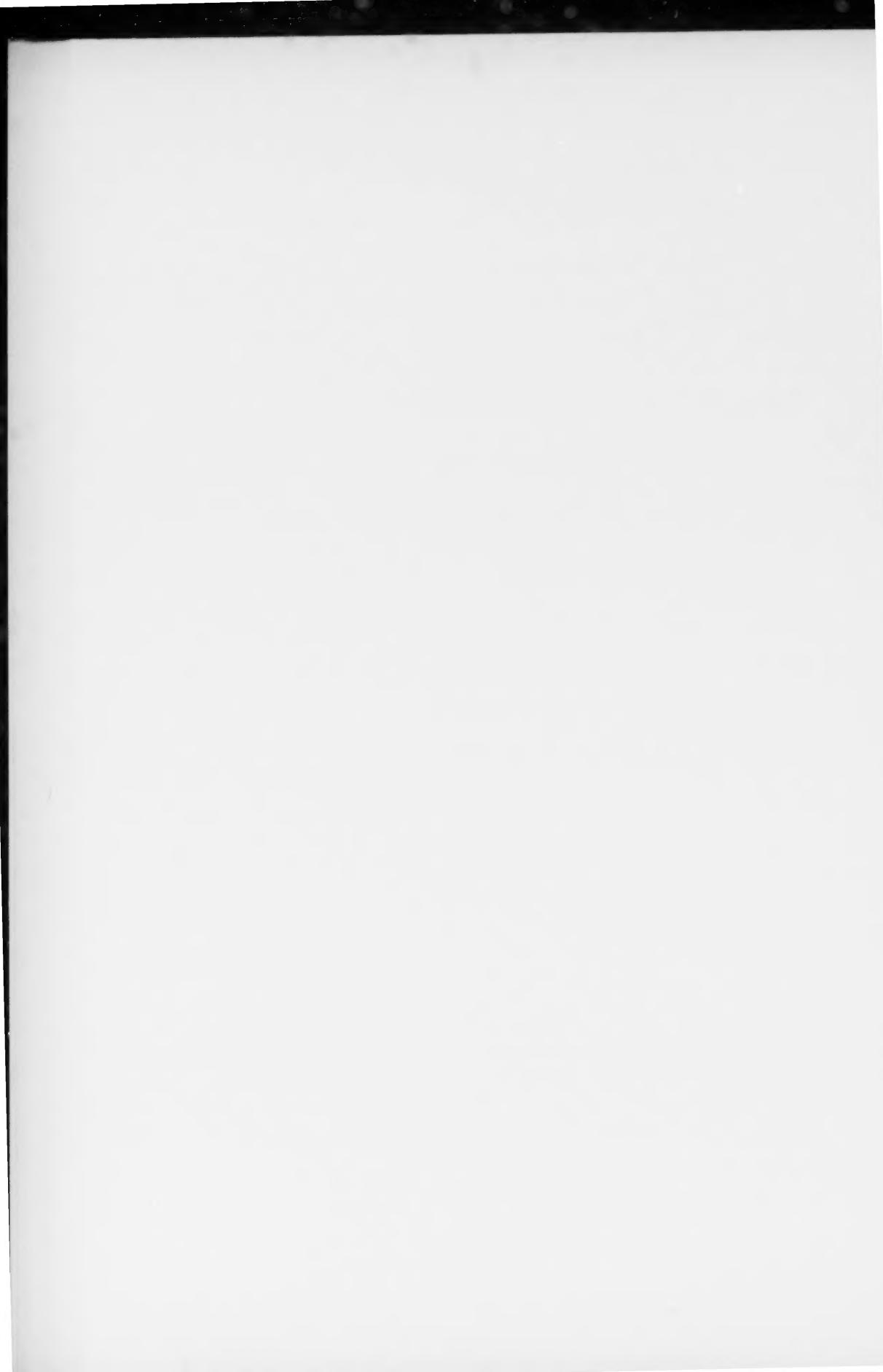
¹³In Doe v. Bobbit, 881 F.2d 510 (7th Cir. 1989), the court discounted Taylor due to its recency in determining whether "in early 1984 a substantial consensus had been reached that placing a child in a potentially dangerous environment in a foster home was a violation of the due process clause." 881 F.2d at 511, 512 n.3.



the children without a judicial hearing; indeed, the children were physically taken from their mothers only upon order of a court.

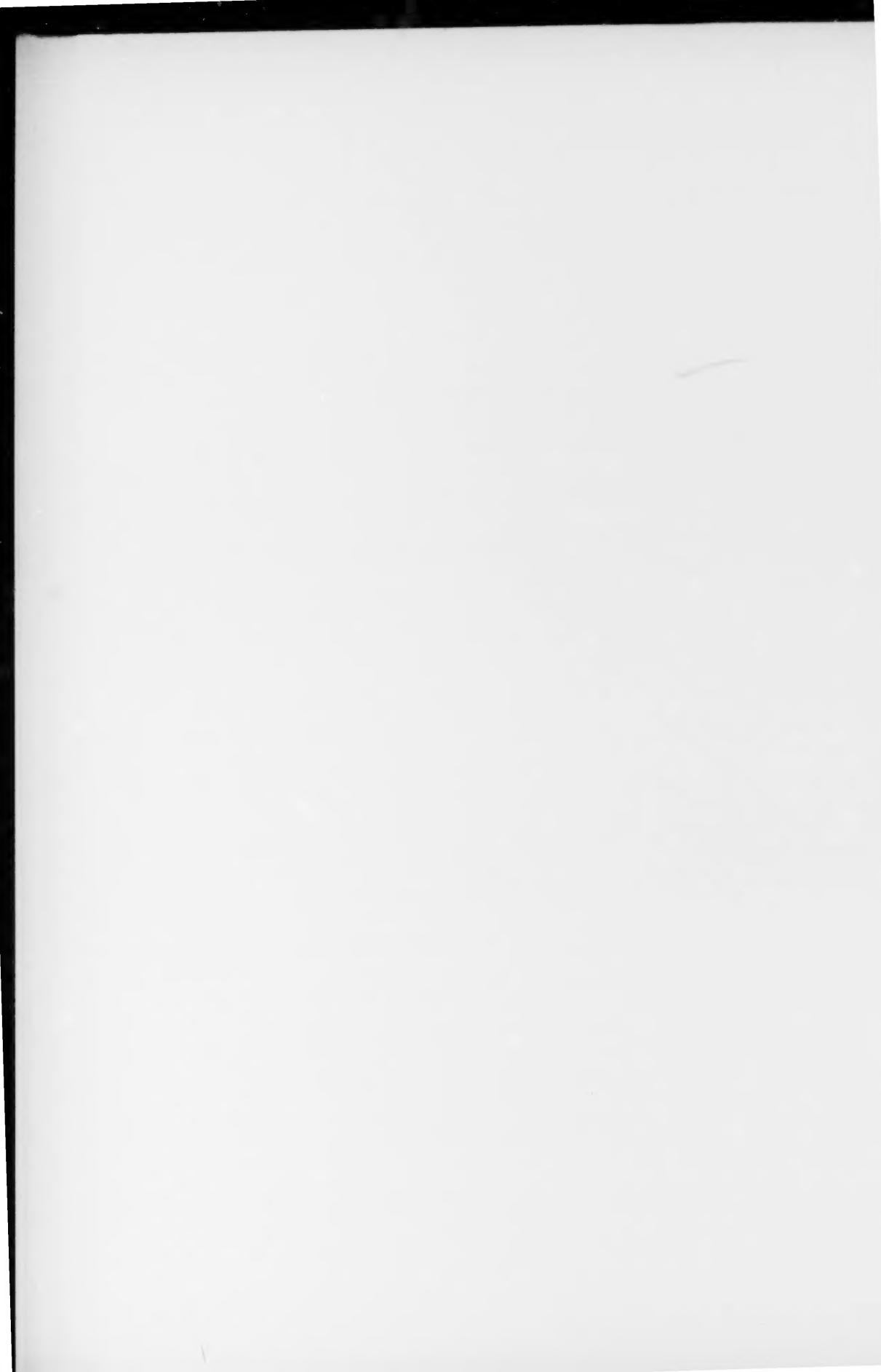
Certainly, the plaintiffs were constitutionally entitled to notice of the proceedings involving their children, and that right was clearly defined in 1984.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The plaintiffs, however, have identified no authority for the proposition that Ms. Tucker, as the person who initiated the court proceedings, bore the burden of providing the plaintiffs with notice. IND. CODE 31-6-4-6 (e), which provides simply that, "Notice shall also be given to his parent, guardian, or custodian if he can be located." Under Indiana law, a summons ordinarily is to be served by a



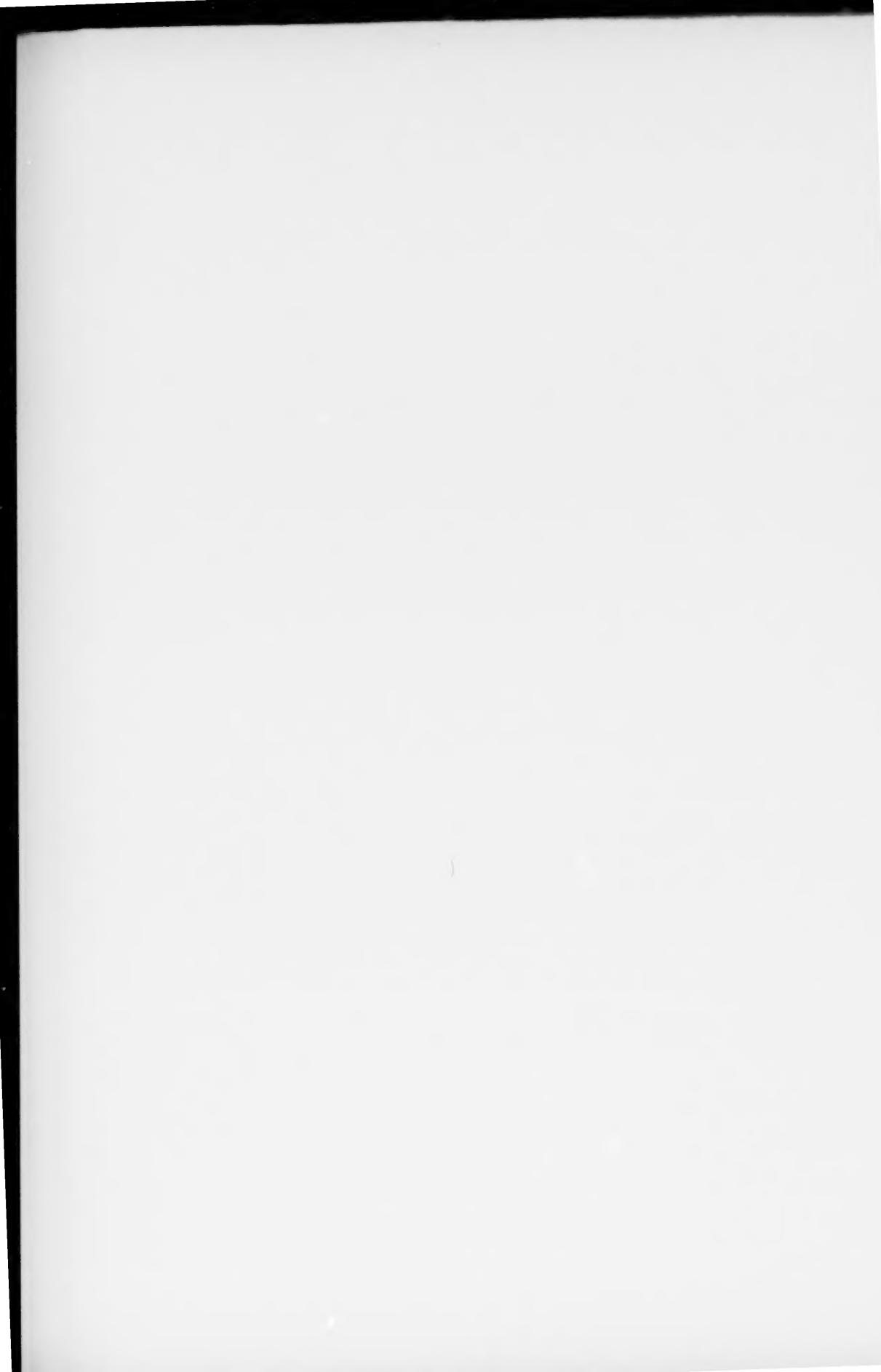
sheriff or someone specially or regularly appointed by the court for that purpose. IND. TR. R. 4.12(a).³

Liability under 42 U.S.C. Sec. 1983 require that the defendant have participated personally in the constitutional deprivation. Morales v. Cadena, 825 F.2d 1095 (7th Cir. 1987); Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986). That plaintiffs have come forth with no case suggesting that one involved in any civil litigation is personally liable for another parties' lack of notice fro the court. further, even assuming that Ms. Tucker bore some constitutionally obligation with respect to notice to the plaintiffs, nothing in the record supports an inference that the failure to give notice was intentional; Ms. Tucker cannot be held liable under Sec. 1983 for negligent failure to



give notice. See Brunken v. Lance, 807 F.2d 1325, 1331 (7th Cir. 1986). Finally, the plaintiffs have not demonstrated any actual harm for which they do not share principal responsibility. See People of State of Illinois ex rel. Hartigan v. Peters, 871 F.2d 1336, 1341 (7th Cir. 1989) ("Peters was given a full and fair hearing once he came before the court minimizing the effect of any possible defects in notice."). Reasonable conduct is not an unconstitutional condition of notice. See Lehr v. Robertson, 463 U.S. 248, 264-265 (1983).

For the foregoing reasons, the court concludes that the plaintiffs have not identified relevant decisional law clearly establishing constitutional rights that Ms. Tucker might be found to have violated.



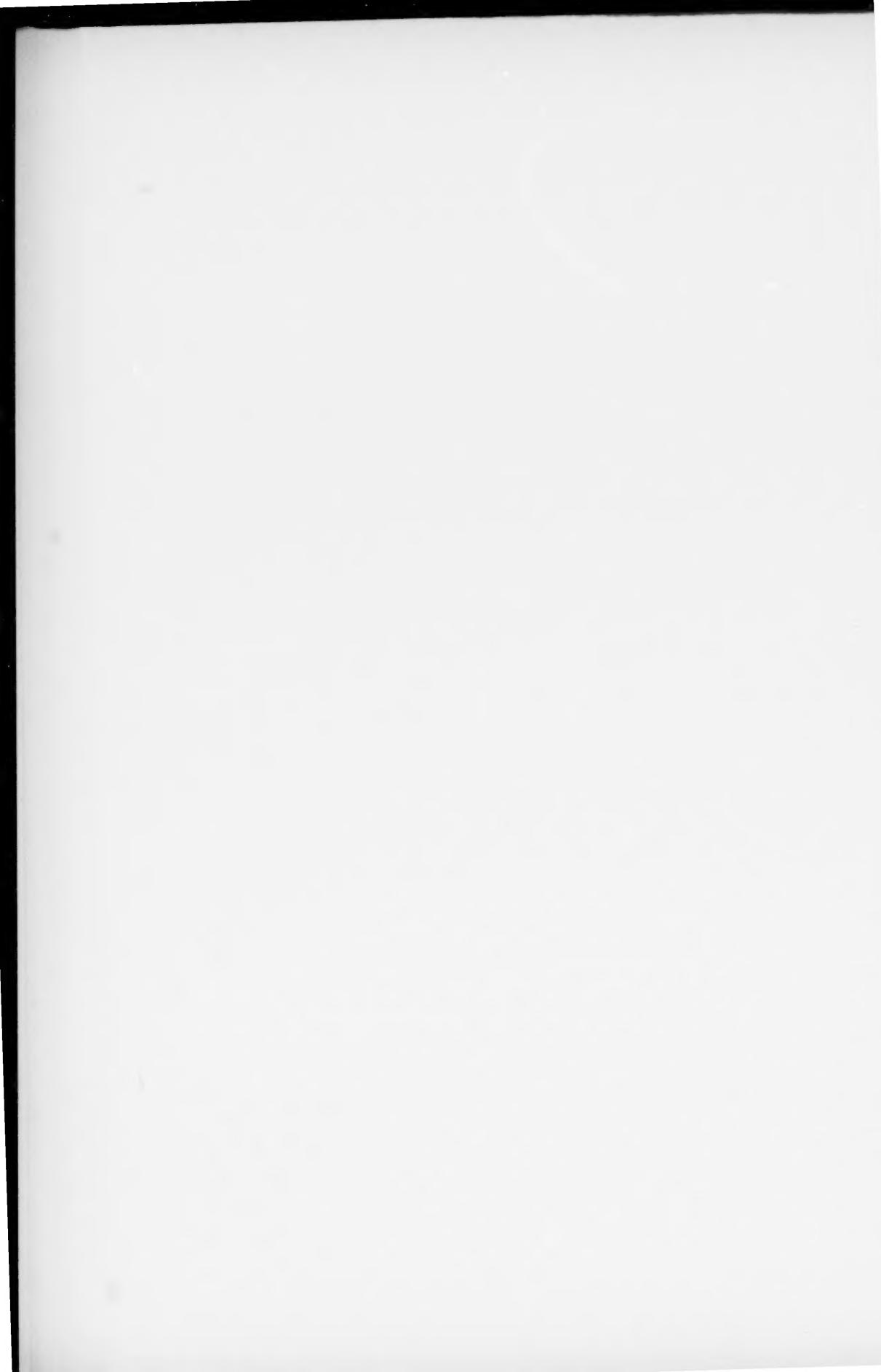
Further, the undisputed facts indicate that Ms. Tuckers' conduct as a child welfare worker was not so shocking or outrageous as to constitute an obvious constitutional deprivation notwithstanding the absences of such case authority.

Ms. Tucker attempted to investigate the potential CHINS status of the plaintiffs' daughters, although the plaintiffs' flight from Wabash County hindered her investigatory efforts. Ms. Tucker cannot be blamed for any deficiencies attributable to the children's absence resulting from the mothers' actions. See Mazanec v. North Judson-San Pierre School Corp., 798 F.2d 230 (7th Cir. 1986). Her investigative efforts included discussions with neighbors, school officials, and an inspection of the children's former residence. She also spoke with Rev. Merrill, who recently

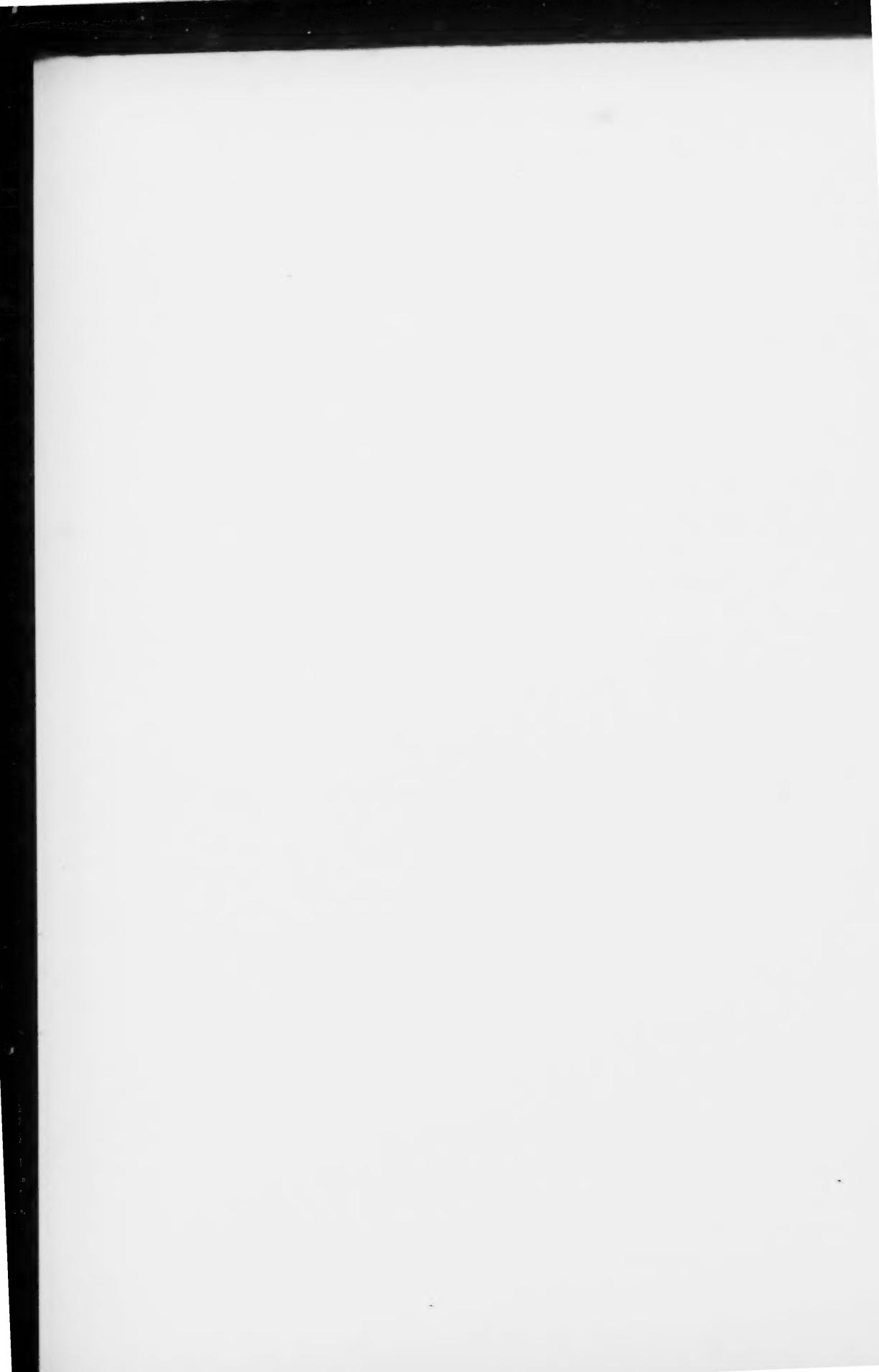
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had been seen the children and their condition. All of who recently had seen the children and their condition. All of the information received confirmed that: 1) the children had lived in a communal fairly atmosphere in Wabash County in which they complained of insufficient food and clothing, 2) the living conditions were consistent with the beliefs of the religion observed by their mothers, 3) the plaintiffs had no permanent plans for residence or housing in their new location, 4) the children had been removed from school without notice, and 5) no plans for substitute education had been made.

Based on the knowledge acquired through these inquiries, Ms. Tucker recommended and assisted in the filing of CHINS petitions, securing a court-ordered removal of

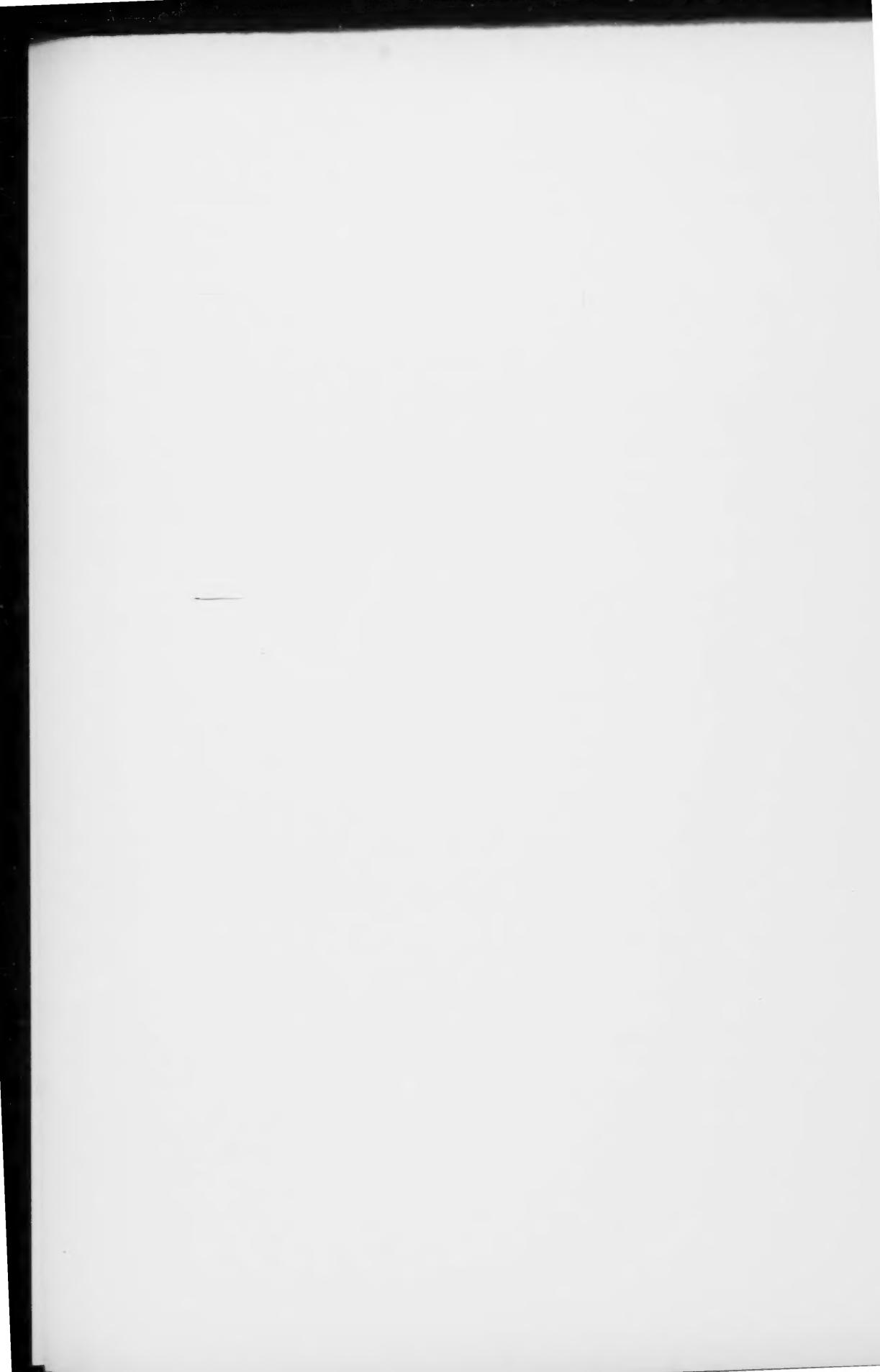


the children from the plaintiffs. While Ms. Tucker might have waited or pursued other investigative avenues before making the decision to file or accomplished the filing, her actions cannot be viewed as objectively unreasonable in these circumstances. The children's upbringing had been unorthodox and there was clearly concern for their welfare in the community that had observed such a family atmosphere. Moreover, Ms. Tucker's involvement in these cases was not superficial. She herself traveled with a family friend, Paul Wildridge, to Indianapolis to transport the children back to Wabash and during the children's stay in foster care was in contact with their mothers on several occasions in an apparent attempt to keep them informed of their rights. Acting within her grant of discretion in the investigation of these cases, Ms. Tucker



cannnot be held accountable for any wrong inadvertently caused the plaintiffs.

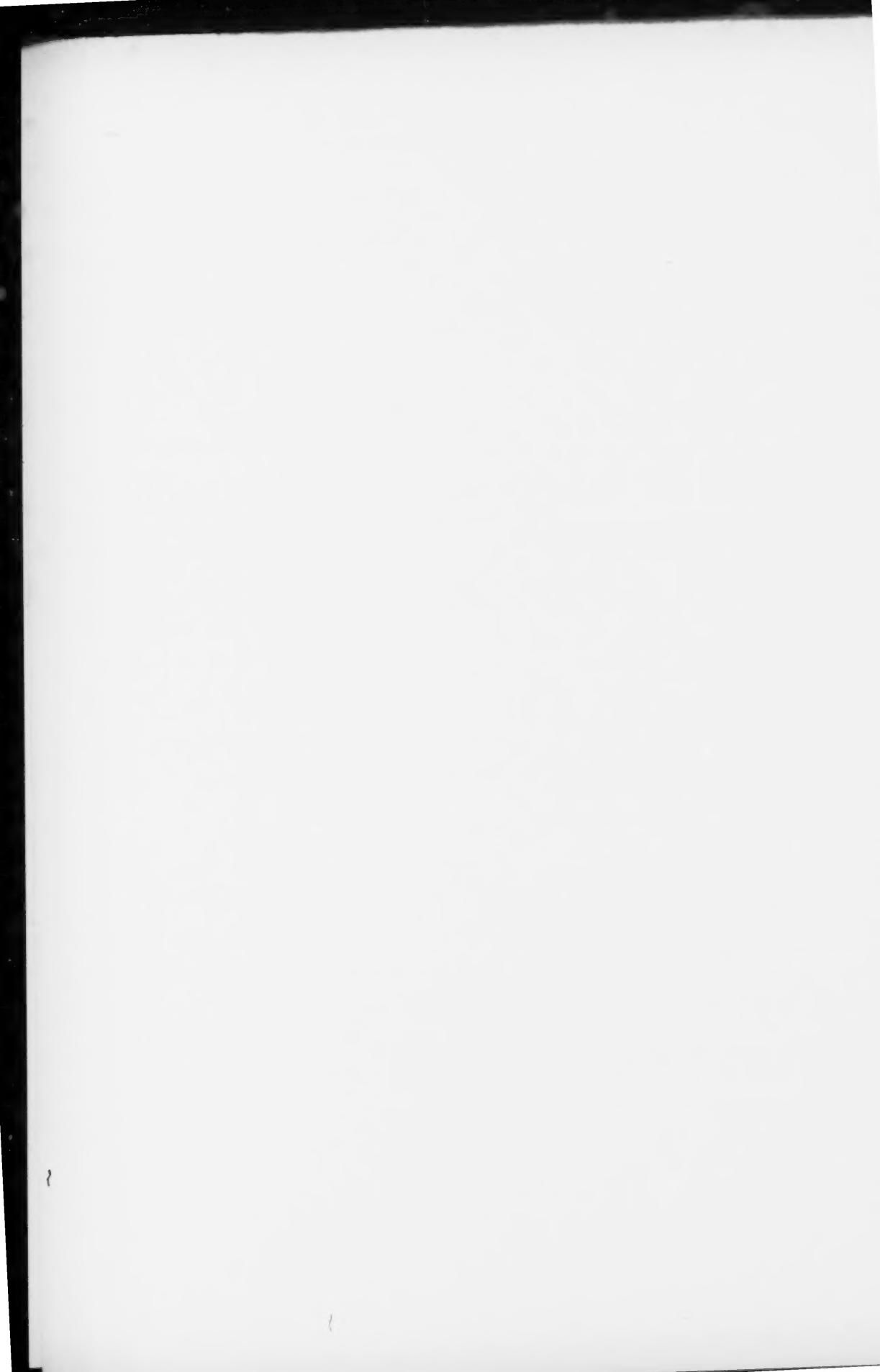
One of the plaintiff's First Amendment claims attacks Ms. Tucker for suggesting that Ms. Millspaugh and Ms. Dyson would have to surrender their religious views in order to keep their daughters. The relevant facts here demonstrate that during a telephone conversation between Ms. Millspaugh and Ms. Tucker, the caseworker indicated that those factors to be considered by the judge in a CHINS proceeding include the stability of the household, living conditions including the adequate provision of food and clothing, and educational provision. While Lois Millspaugh may have interpreted such a communication as indicating that she would have to abandon the Faith Ministries to regain custody



of her children, this conclusion is not implicit in Ms. Tucker's communication. Moreover, the information provided to Ms. Millspaugh is consistent with that used by the Department and the Indiana courts in CHINS proceedings. IND. Code 31-6-4-3. Ms. Tucker's conduct in this regard was not unreasonable or inappropriate within her duties.

The plaintiffs have suggested no set of facts that demonstrate the unreasonableness of Ms. Tuckers' conduct in the CHINS proceedings regarding the Millspaugh and Dyson children.

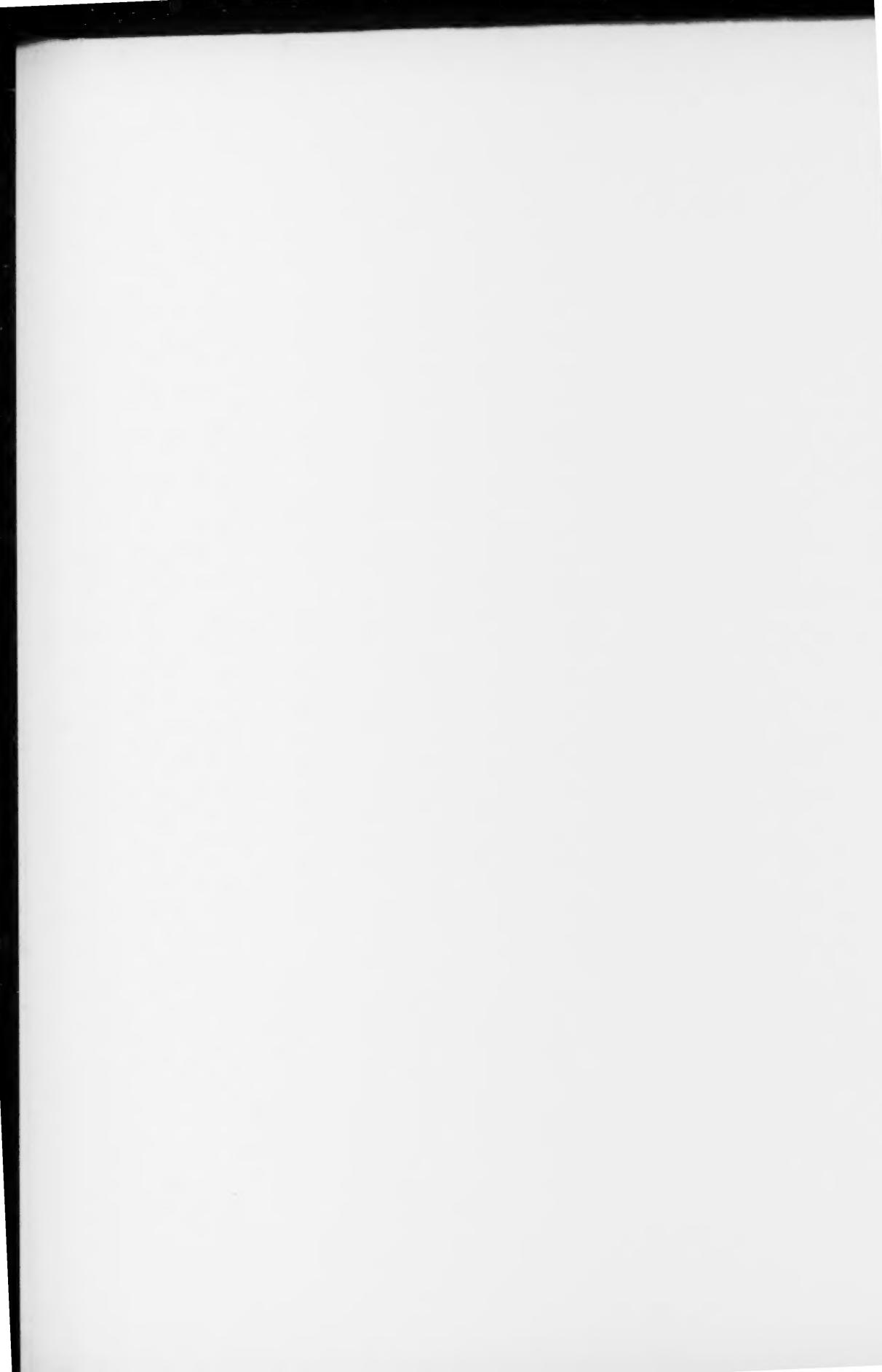
To the contrary, it appears that Ms. Tucker accomplished her duties as a caseworker in these matters with care, attempting as best she could to contact the parents and relay the circumstances of the cases. Acting



within the confines of her official position, defendant Manetta Tucker is immune from liability these cases.

V. Defendant Wabash County Welfare Department's
Motion for Summary Judgment
A. Arguments of the Parties

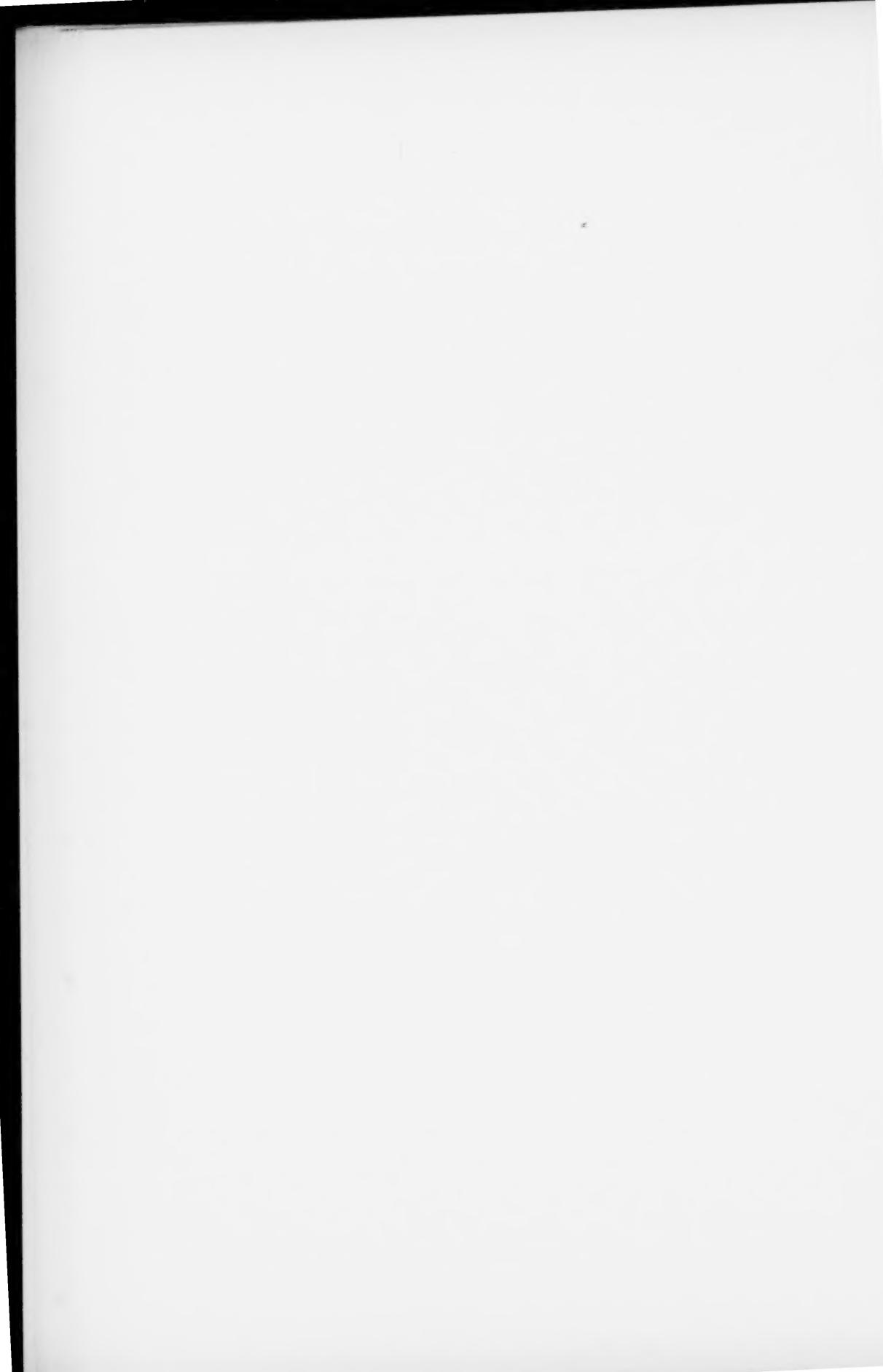
The Wabash County Welfare Department makes several arguments on summary judgment, some of which parallel Ms. Tucker's position. In general response to the actions, the Department argues that the plaintiffs themselves bear the responsibility for the events at issue: (1) the plaintiffs have failed to demonstrate causation of any constitutional injury or civil rights remedy in light of the plaintiff's failure to appear at proceedings concerning their children; and (2) any right to be heard was



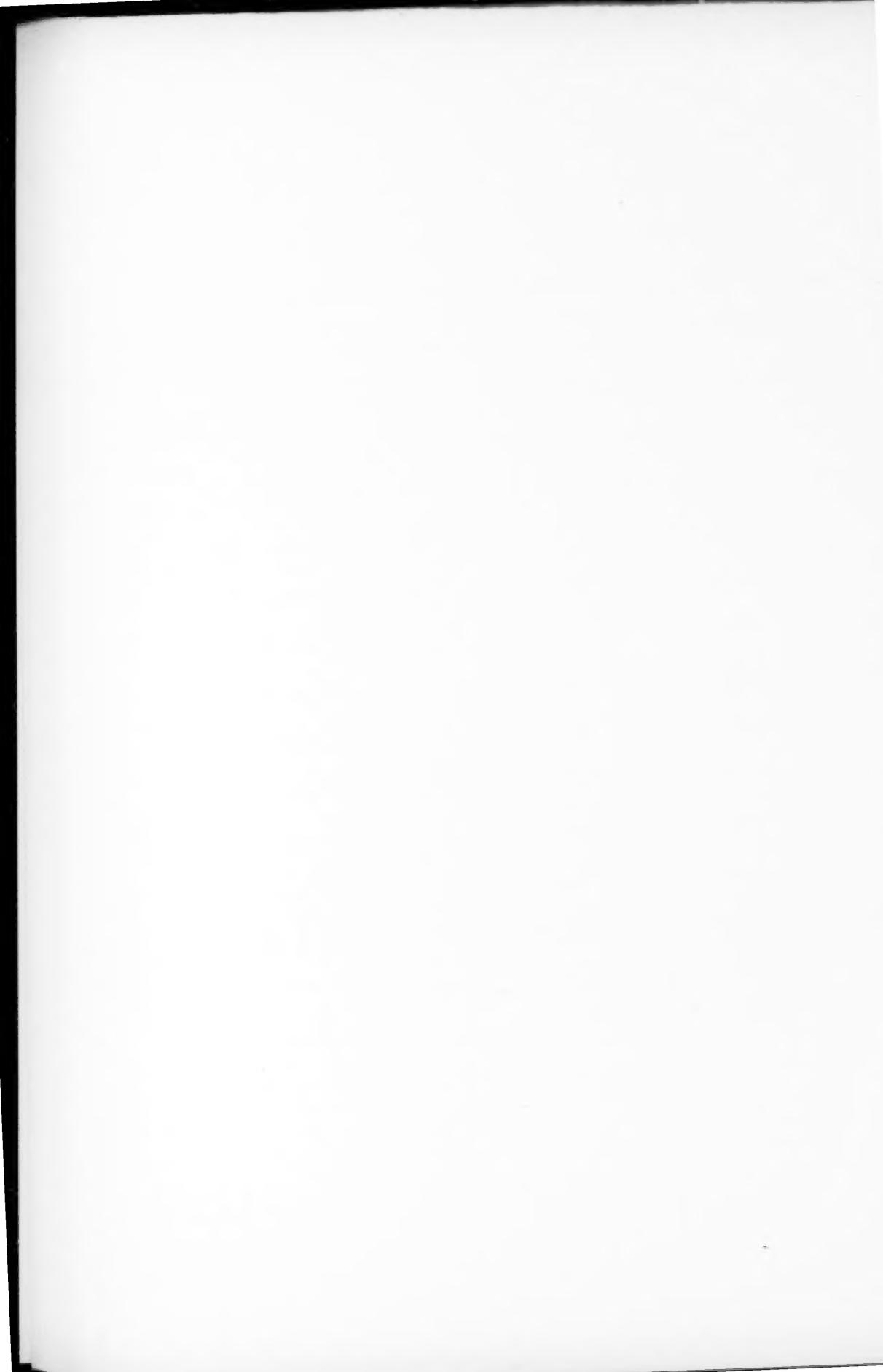
waived by such failure to appear. The plaintiffs make no specific response to these assertions.

A majority of the Department's arguments address the various due process constitutional arguments brought under Sections 1983 and 1985. The Department basically argues that any injury the plaintiffs may have suffered as a result of lack of sufficient notice, failure to server process, inadequacies in the CHINS disposition, detention or fact-finding hearings were not the result of an official policy or custom of the Department and that any action that were taken were appropriately conducted under the rules, regulations, and administrative directives of the Indiana Department of Public Welfare.

The plaintiffs do not directly challenge



the legal standard offered by the Department, but rather claim that those illegal actions taken were done under the Department's policy with deliberate indifference to their rights. Specifically, the plaintiffs allege that certain actions taken pursuant to departmental policy were unreasonable in their cases: (1) emergency action taken to detain their daughters; (2) minimal efforts to give notice of hearing dates and serve progress; (3) failure to give notice by publication; (4) failure to make reasonable efforts to investigate before detention; (5) continuation of the CHINS case following physical and psychological exams under the children that demonstrated competent performance of the daughters; and (6) blind reliance on anonymous information and newspaper stories with little independent confirmation. The



plaintiffs also argue that the Department's involvement in these proceedings constitutes policy-making.

The Department also contends that no Section 671 action can be maintained because of adequate case plans were developed in the Dyson and Millspaugh cases pursuant to that statute. Moreover, the Department asserts that any unavailability of that information or failure to provide the plaintiffs with copies of the case plans resulted from the plaintiff's own conduct and hence is not attributable to the Department. The plaintiffs' position that the case plans were inadequate relies on their arguments regarding failure to investigate these matters sufficiently before filing CHINS petitions.



Finally, although the Department does not directly addresses the First Amendment religion claim, the right to privacy claim, or the Fourth Amendment claim, it suggest a lack of viability of all of the plaintiffs' constitutional claims in general based on the arguments, outlined above, of lack of causation, waiver of notice, and contravention of the Department policy. The plaintiffs contend that departmental policy was directly applied in their children's cases in contravention of constitutional law. Specifically, with regard to the freedom of religion claim, the plaintiffs attribute the defendants with deliberate application of their policies so as to curtail the plaintiffs' religious practices.

Since both the Millspaugh and the Dyson causes of action (including the numerous



claims) arise under 42 U.S.C. Section 1983, the court will first address the defenses of a governmental authority raised under that statute. Ultimately, these defenses demonstrate how the law divorces the Department from any liability in these causes.

B. Applicable Law for Section 1983

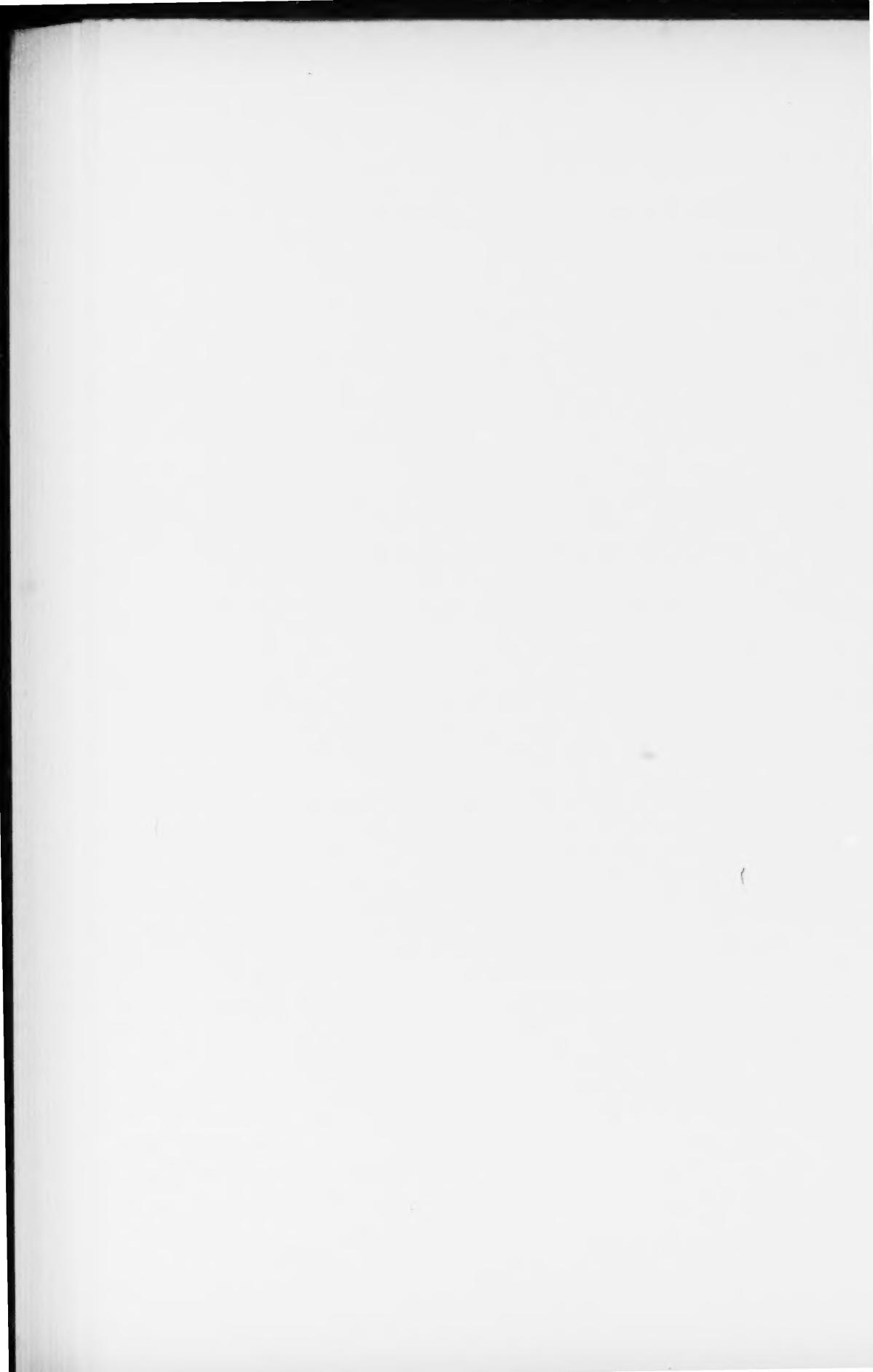
Due Process Claims

As an arm of the Wabash County government, the Department can be held liable in a civil action brought under 42 U.S.C. Section 1983. In Monell v. New York City

Dept. of Social Services, 436 U.S. 658 (1979), the Supreme Court revisited and revised its prior ruling in Monroe v. Pape, 365 U.S. 167, 181 (1961). While Monroe v. Pape had held that, "Congress did not undertake to bring municipal corpora-



tions within the ambit of " Section 1983, Monell held that local governments may be held responsible when their official policies cause their employees to violate another's constitutional rights even when the policies have not received formal approval through the bodies' official making channels. 436 U.S. at 691. The Monell Court did not recognize governmental liability under Section 1983 on the theory of respondent superior, but rather "when execution of the government's policy or custom, whether made by its lawmakers or by those who edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983". 436 U.S. at 694; Archie v. City of Racine 847 F.2d 1211, 1214 (7th Cir. 1988); Gray v. Dane County, 854 F.2d 179, 182-184 (7th Cir.



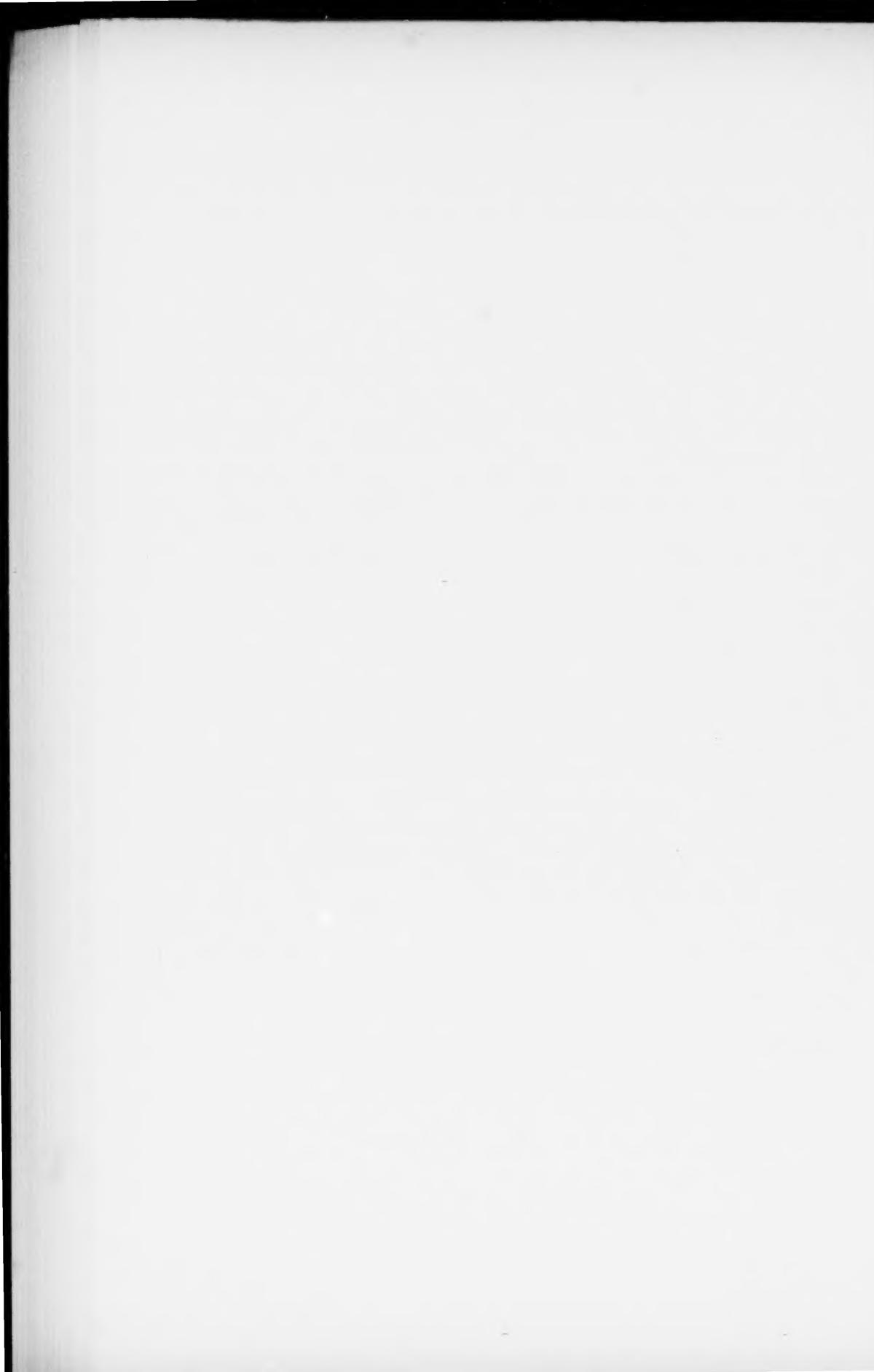
1988); Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986); Woods v. City of Michigan City, Ind., 685 F. Supp. 1457, 1462 (N.D. Ind. 1988).

The Department's official policies with respect to the CHINS proceedings conducted in these causes are those established by statutes, rules, regulations, and administrative directives authorized under Indiana law. Those Indiana statutes controlling Department policy include IND. CODE 31-6-4-1 et seq. Additionally, the Indiana Department of Public Welfare ("IDPW"), establishes its own set of directives in accordance with Indiana law to guide welfare workers in carrying out their jobs. Many of those rules and regulations are specifically set forth in the IDPW Manual for Child Welfare/Social Services provided for each agency and its officials. To establish



their claims under Section 1983 then, plaintiffs must show that their rights were violated through those official policies or some other conduct shown to be official policy of the Department.

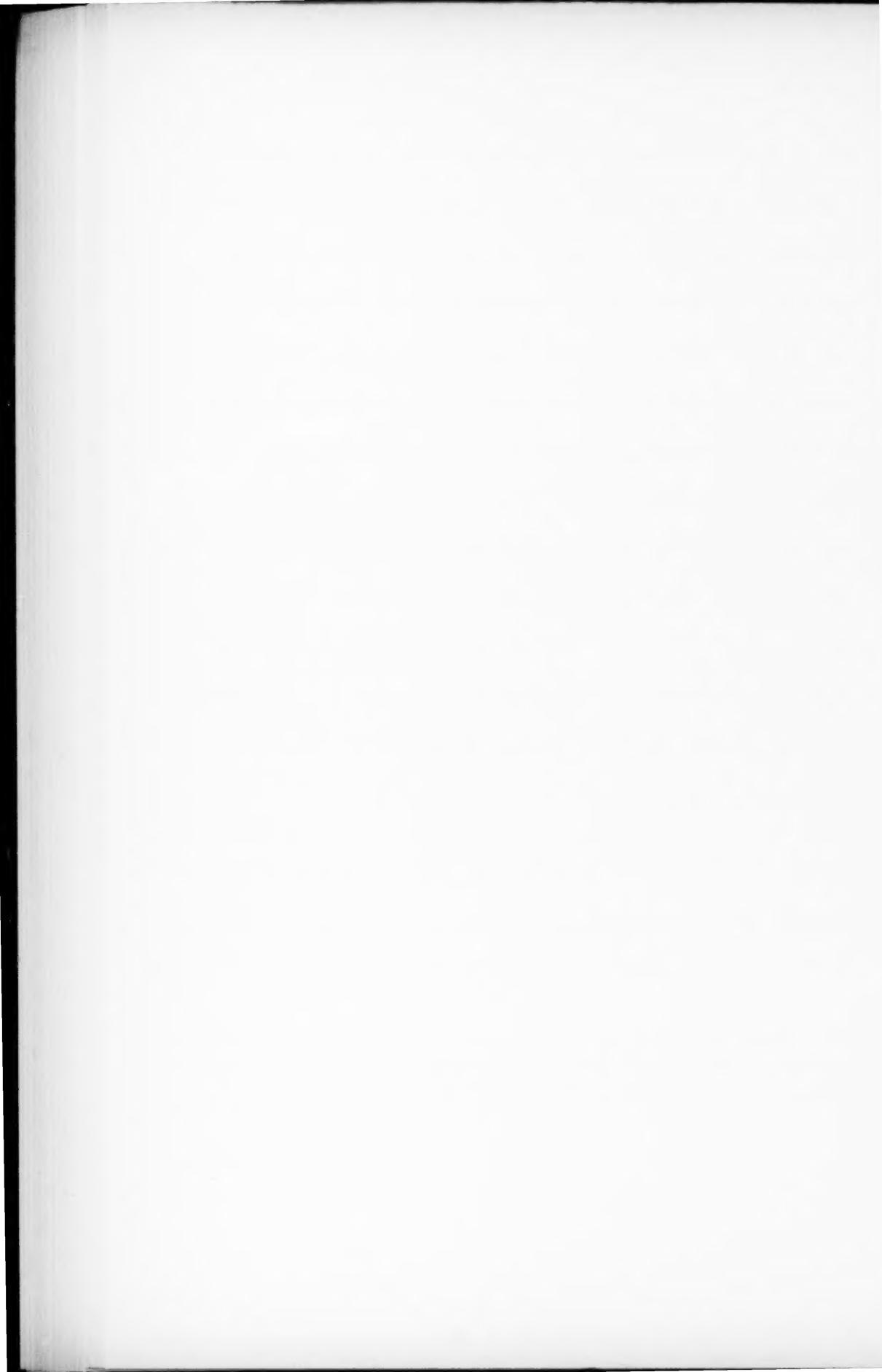
And examination of the policies and directives of the IDPW manual reversals support for the conduct of CHINS proceedings in these matters. Sections 204 and 205 provide procedures for the intake of information and the general procedures to follow in investigating a potential CHINS. Section 204.10 specifically permits accepting and giving credence to reports from anonymous sources. Investigative avenues outlined in Section 205.4 include the emergency removal of a child as authorized by court order in the course of conducting the investigation. See also IND. CODE 31-6-4-



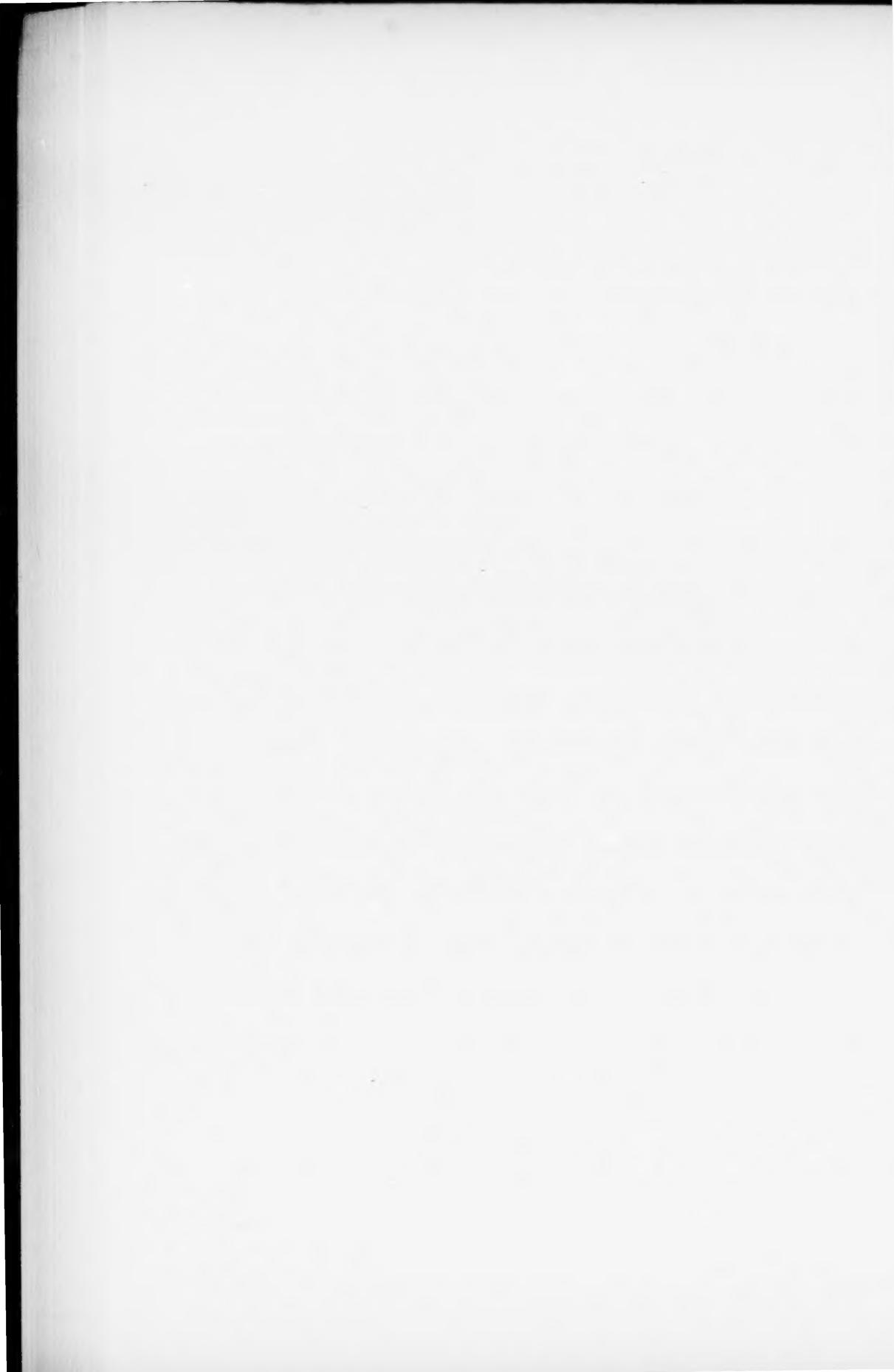
4. The other investigative procedures listed (interview with child, medical or psychological examination, collateral contacts and assessments or rescue to child)¹⁴ were accomplished by the Department as soon as practicable in these cases. Notably, though, Section 205.7 dictates that investigations and reports of CHINS cases should be conducted in the county where the alleged abuse took place. Section 305 of the IDPW manual requires a determination of probably cause of CHINS proceedings before such are instituted or pursued. See also IND.

CODE 31-6-4-3; Wardship of Nahrwold v.
Department of Public of Allen County, 427
N.E. 2d 474 (Ind. App. 1981).

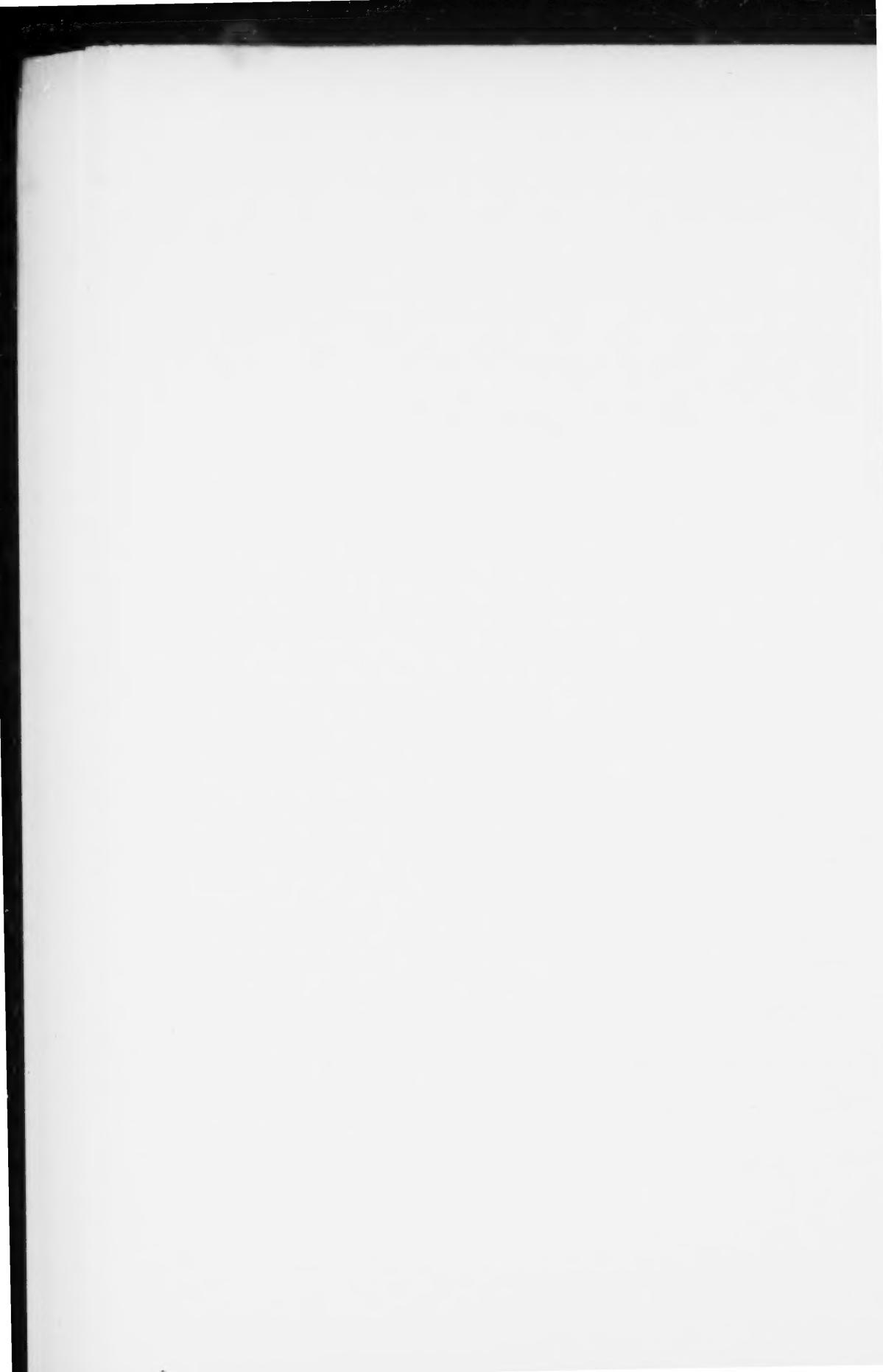
¹⁴ The remaining suggested procedure, home visit, was not easily obtained due to the mobility of the plaintiff's home.



There is no evidence to suggest that the Department failed to follow the above listed procedures in their conduct of the Millspaugh and Dyson investigations and institution of proceedings. To the contrary, the evidence at hand suggests that the investigation was conducted as best as practicable under the circumstances and that Department officials made the probable abuse determination required by law before proceeding further. See IND. CODE 31-6-4-7 and IND. CODE 31-6-4-8. However, even if the Department or its officials failed to conformed to these dictates, such does not give rise to Section 1983 liability. To establish that linkage, the plaintiffs must establish that their allegations and grievances emanate from some policy or custom attributable to the Department.



Post-Moneil cases have further defined the range of governmental official conduct attributable to the agency or local body as a whole. For instance, the Court has held further that a single decision taken by the highest officials responsible for setting policy in that area of the government's business can be attributed to the municipality for purposes of Section 1983. Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Owen v. City of Independence, 445 U.S. 622 (1980). Single decision made by decision-makers with final authority to establish local governmental policy can also be attributable to the governmental authority under section 1983. Pembaur v. Cincinnati, 475 U.S. 469 (1986). Whether an official has final policy-making authority is a question of state law. City of St. Louis v. Prprotnik, 108 S. Ct. 915



(1988). Generally, proof of a single incident of unconstitutional activity is insufficient to impose municipal liability unless there is proof that it was caused by an existing municipal policy attributable to a municipal policy-maker. Oklahoma City v. Tuttle, 471 U.S. 808 (1984).

Several Wabash County welfare employees were engaged in official activities related to these actions. Besides Ms. Tucker, the evidence suggest the involvement of Welfare Department attorney Steve Downs and the departmental supervisor. However, none of these persons made or established policy in their actions. Rather, their conduct amounted to that normally engaged in the course of their duties: conducting CHINS-related investigations, determining if probable cause exists to proceed further,



and participating in CHINS proceedings. While the plaintiffs may question the completeness of the investigation and challenge the existence of probable cause, they have not demonstrated facts that could lead a reasonable trier of the facts to find that departmental policy resulted in faulty investigations or an improper basis to pursue CHINS cases. If such defects arose in the investigation and filing of CHINS petitions in the Millspaugh and Dyson cases, it was not due to Departmental policy or decision by Department policy-makers, but rather to practices outside of the policy dictates under Indiana statutes and IDPW directives. See generally Adamanson v. Volkmer, 680 F. Supp. 1191 (N.D. Ill. 1987).

A similar line of analysis follows with regard to the service of process on, and



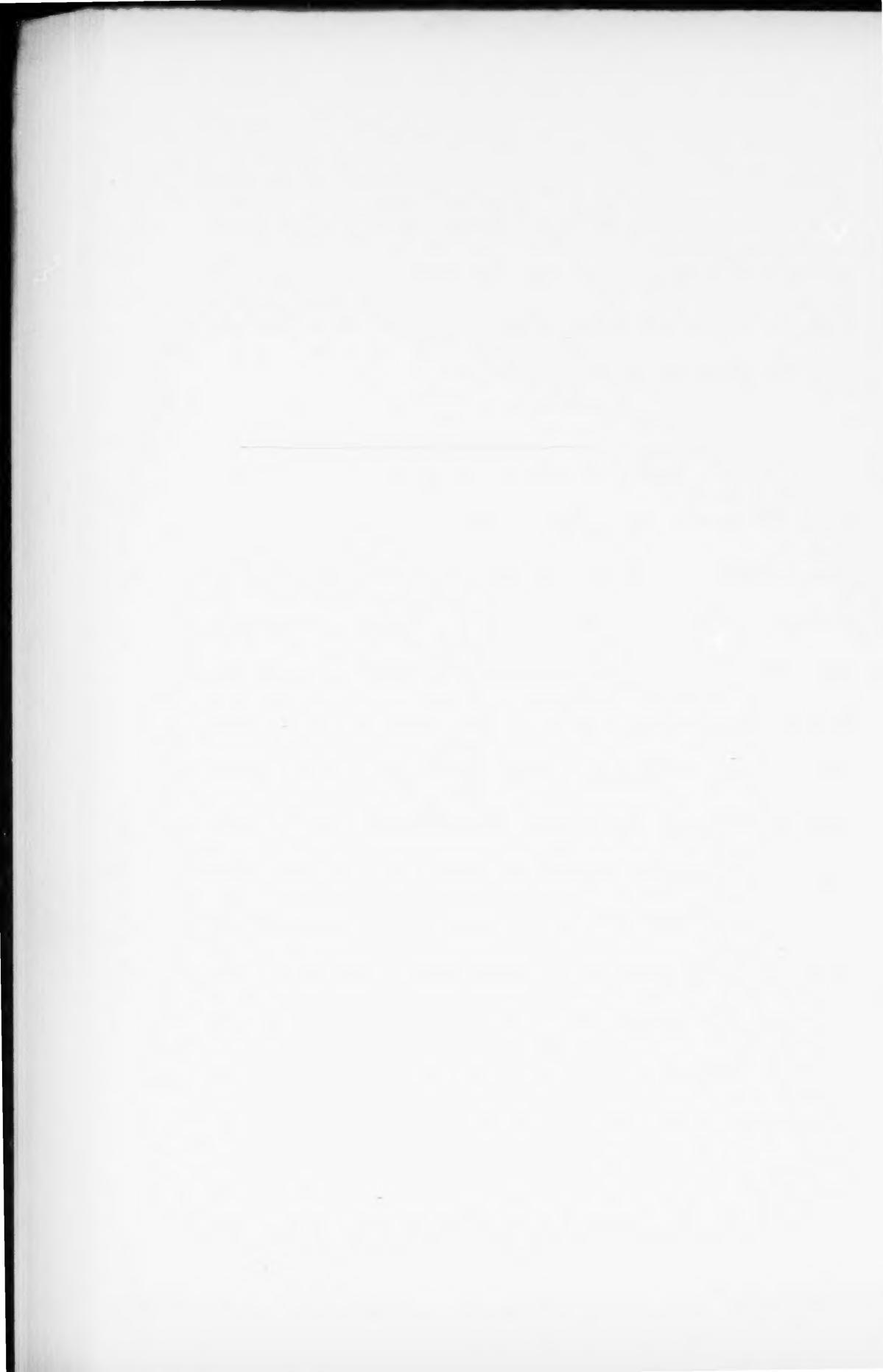
notice to, the plaintiffs and evidentiary proceedings held in the CHINS cases. The plaintiffs maintain that the defendants should be faulted with providing inadequate notice of the proceedings in their daughters' cases. The record, however, reveals the plaintiffs' knowledge of the various proceedings via their phone calls shortly before or after the hearings occurred.¹⁵ Further, the plaintiffs accentuated the difficulty in serving process with their frequent travels. Generally, however, the undisputed facts establish that the plaintiffs were on notice of the proceed-

15 The defendants report that notice was at least attempted on Mr. Paul Wildreidge as requested by the plaintiffs, who deny that such service was accomplished as they had requested. The department conceded that notice to Mr. Wildredge was returned unserved. Nonetheless, the plaintiffs appeared to have acquired knowledge of the various proceeding though some source.



ings, the failure to accomplish service was not the fault of the Department, and that even if inadequacies in the service did exist, the inadequacies were not attributable to Department policy.

IND. CODE 31-6-4-6 provides that notice must be given of post-deprivation hearings to parents upon detention of a child under court order. Here, however, the officer conducting the arrest was given that responsibility. To the extent the detaining officers did not provide adequate notice to Lois Millspaugh and Tina Dyson, it was neither the fault of the Department nor in accordance with policy as dictated by statute. Generally, though, the plaintiffs have failed to demonstrate any damage resulting from the failure to serve process; the record indicates that knowl-



edge of the proceedings existed regardless of successful service. See Donald v. Polk County, 836 F.2d 376 (7th Cir. 1988) (no violation of due process rights under Section 1983 could be maintained where plaintiffs suffered no actual damages from failure to give notice of dispositional hearing).

The plaintiffs also challenge the sufficiency of notice regarding other CHINS proceedings conducted with respect to their daughters. IND. CODE 31-6-7-5, along with IDPW manual Section 306.1, sets forth time requirements for service of process at the different states of a CHINS case. The statute and the annual section speak of time limits of at least three days for personal service and ten days for service by mail, but there is no formal policy or



statutory design as to how such service may or must be accomplished.

The plaintiffs fault the defendants for not attempting service by publication. While the type of notice is not set forth in a policy or directive (and hence the department officials would appear to have discretion in this procedure), it is unlikely that departmental officials create a policy or custom for effecting service for each case. There is no evidence to suggest that Welfare Department attorney Steve Downs had such policy-making capacity. Even so, given the plaintiffs' travels during the pendency of the CHINS cases, it can hardly be argued that publication in a Wabash County newspaper would have informed them better of hearing dates and of their parental rights in the proceedings. The plain-

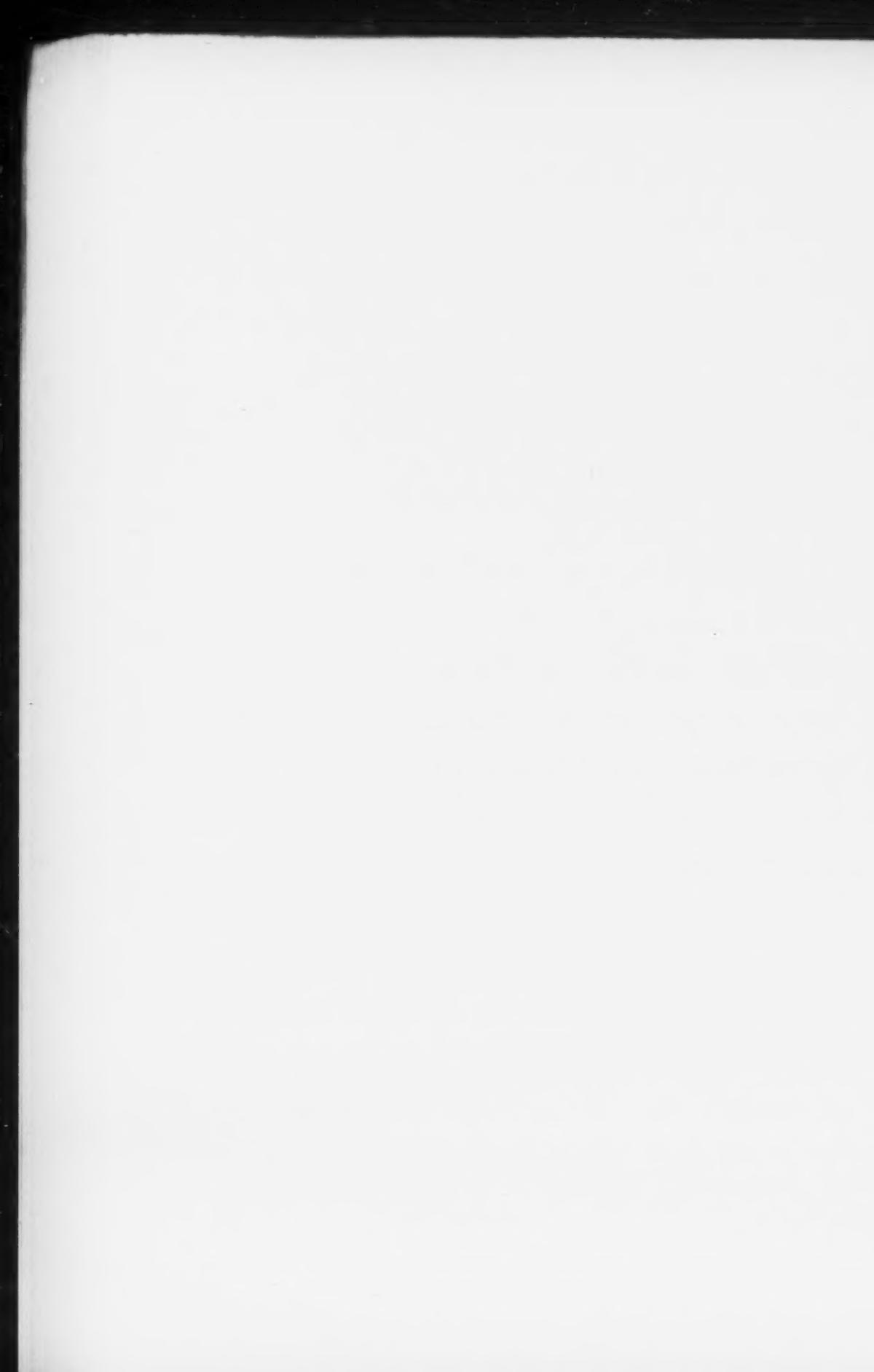
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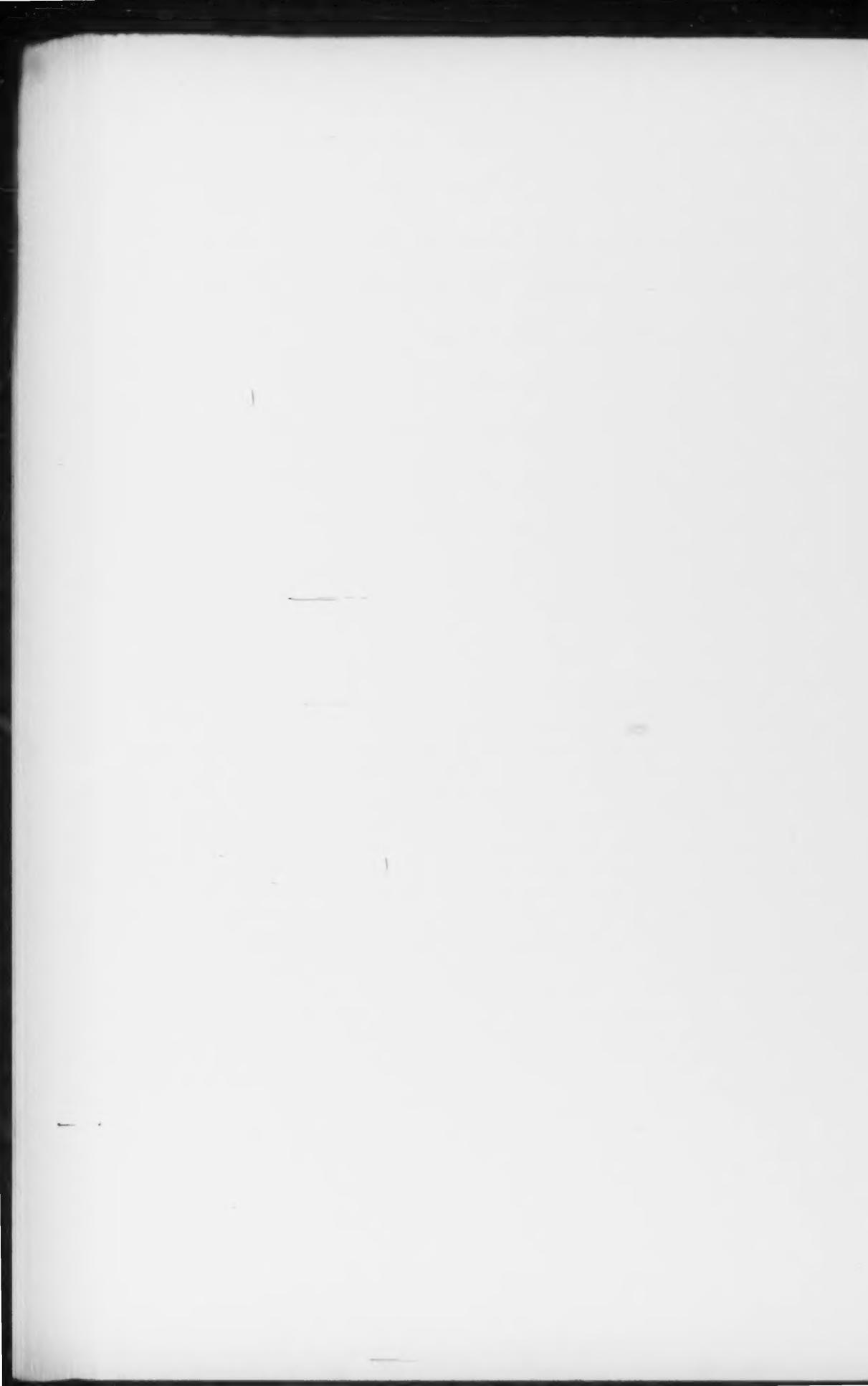
tiffs have not demonstrated a causal connection between inadequate service and their alleged deprivations. See Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir. 1985); Muckway v. Craft, 789 F.2d 517, 521 (7th Cir. 1986).

With regard to the sufficiency of the fact-finding and dispositional proceedings in their daughter's CHINS cases, the plaintiffs argue that certain evidence was insufficient and/or suppressed by the defendants, that reports were not timely, and that hearing dates and times were rescheduled without notice. first, if these allegations are correct, they contravene departmental policy as provided in Indiana statutory law. Statues and the IDPW manual specifically outline the requirements for preparation and filing of



dispositional reports, IND. CODE 31-6-4-14; 31-6-4-15; 31-6-4-15.3 and Section 306 of the IDPW manual, and provide for the types of evidence necessary for proper review at a fact-finding hearing IND. CODE 31-6-4-13-.5; 31-6-4-14; 31-6-7-13. A number of complications burdened the Department and judicial officers in conducting these cases at the dispositional level: difficulty in establishing contact

⁴⁶ Ms. Millspaugh's suppression argument appears to be directed, not to the fact-finding hearing, but to the initial hearing conducted on May 16, 1984, during which such evidence is premature. IND. CODE 31-6-4-13.5. As such, her legal position has no basis in fact or support under statutory requirements for such hearings. Ms. Dyson's suppression argument focuses on the dispositional phase of the CHINS proceedings, but she shows no facts suggesting that evidence of the physical and mental health of her children was suppressed. Based on the facts in the record, the physical and mental good health of all four of the children appears to be well-documented.



with Lois Millspaugh and Tina Dyson; Charles Millspaugh's appearance on behalf of his daughters; and lack of legal counsel representing the plaintiffs at the early stages. Hence, any nonconformities with those Department policies not only are non-actionable under Section 1983, but may not even be attributable to the Department. Moreover, the plaintiffs have failed to trace the fault for the alleged scheduling difficulties directly to the defendants; certainly the scheduling of the CHINS proceedings and subsequent notice of the scheduling are matters for the concern of the presiding court, not the Department.

In response to the Department's summary judgment motion, the plaintiffs have failed to demonstrate any causal connection between the Department's policies in conduc-



ing CHINS proceedings and the alleged deprivations. The allegations in the complaint do not stand without further factual support.

C. Constitutional Claims under the
First and Fourth Amendments and the
Right to Privacy

Generally, as with those due process claims discussed above, the plaintiffs have failed to attribute the remaining constitutional violations alleged to Department policy.

The plaintiffs' claims under the First Amendment seem to focus on Ms. tucker's statements to Ms. Millspaugh, discussed above, regarding the care of her daughters, Paula and Jean. The plaintiffs have not identified any other actions by the Depart-



ment or its officials that suggest a violations of First Amendment rights, either with regard to the free exercise clause or free association clause.

Specifically, with regard to a parents' choice of religion, Department policy prohibits any prejudice based on religious beliefs. IND. CODE 31-6-4-3. Hence to the extent that any Department official conducted these CHINS proceedings with religious prejudicial motives, such practice was clearly adverse to establish policy and non-actionable in these Sections 1983 actions against the Department. See Adamson v. Volkmer, 680 F. Supp. 1191.

Basically, though, the plaintiffs have not met their summary judgment burden of coming



forward with evidence of religious motivation or of the defendant's violation of their right to freely associate. To the contrary, the plaintiffs continued to practice their religion and freely express themselves in this manner throughout the course of the CHINS proceedings. The plaintiffs have no actionable claims under the First Amendment.

The plaintiffs' Fourth Amendment claims are somewhat fuzzy. They appear to contend in their complaint that the defendants have in some way illegally seized their daughters, but give no factual basis for the accusation or legal support for the claim. Accordingly, the plaintiffs having failed to defend or support their Forth Amendment claim on summary judgment, the court need not address the allegations further.



The plaintiffs also allege violations of their rights to privacy against the defendants in the course of the CHINS investigation and proceedings. While the law certainly recognizes such a right in relation to the family, it has also limited the scope of such privacy rights, balancing them against the state's interests in children and their rights. Pesce v. J. Sterling Norton High School, 830 F.2d 789 (7th Cir. 1987); Dayton v. State, 501 N.E.2d 482 (Ind. App. 1986); Brown v. Brown, 463 N.E.2d 310 (Ind. App. 1984). CHINS proceedings are one example of an instance in which the law recognizes the state's interest in protection of children and will limit parental rights when the appropriateness of the care given a child is questioned. Matter of Joseph, 416 N.E.2d 857 (Ind. App. 1981); Wardship of Nahrwold v.



Department of Public Welfare of Allen County, 427 N.E.2d 474 (Ind. App. 1981).

As discussed above, the plaintiffs have not demonstrated how the Department's conduct of these CHINS proceedings are one example of an instance in which the law recognizes the state's interest in protection of children and will limit parental rights when the appropriateness of the care given a child is questioned. Matter of Joseph, 416 N.E. 2d 857 (Ind. App. 1981); Wardship of Nahrwold v. Department of Public Welfare of Allen County,; 427 N.E.2d 474 (Ind. App. 1981)

As discussed above, the plaintiffs have not demonstrated how the Department's conduct of these CHINS proceedings in any way violated the statutory requirements of established alternative policy in violation



of the plaintiffs' rights to privacy. Indiana statutory law in this area was established to assure the protection of parental rights against the balance of the state's parental patriae where the child is concerned. IND. CODE 41-6-4-1 et seq. The plaintiffs have been afforded those protections of their parental rights under these statutes; no other remedy is available before this court.

D. Additional Statutory Claims

Aside from their basic causes of action under 42 U.S>C. 1983, the plaintiffs also raise claims under "color of state law" pursuant to other federal statutes. The plaintiffs' original claims under 42 U.S.C. Section 1981 were voluntarily dismissed without objection at the hearing on these



motions. Additional claims based on 42 U.S.C. Sections 1985 and 671 remain pending.

The plaintiffs established no factual basis for their claims under Section 1985, which addresses a "civil conspiracy under color of state law" in discrimination of the protected rights of an individual or group. The plaintiffs allege some sort of conspiracy against them and/or their religious group's practices by the official of the Department. However, aside from those general allegations in the complaint, the plaintiffs have not established any facts suggestive of the discriminatory animus of the Department or, for that matter, any conspiracy in this regard to meet their burden on summary judgment.

To defeat a motion for summary judgment in



an action under Section 1985, a plaintiff must show at the very least a significant issue of material fact concerning the existence of a conspiracy , Hewitt v. Grabbricki, 596 F. Supp. 297 (D. Wash. 1984), aff'd 794 F.2d 1373 9th Cir. 1985); Lee v. Wyandotte County, 596 F. Supp. 236 (d.Kan. 1984); Chicarelli v. Plymount Garden Apts., 551 F. Supp. 532 (E.D. Pa. 1982), along wit facts showing those actions that were a product of discriminatory animus on the part of th defendant, Jafree v. Barber, 689 F. 2d 640 (7th Cir. 1982); Rynearson v. National Bank of Rochester, 602 F. Supp. 1253 (N.D. IND. 1985); Ekergren v. City of Chicago, 538 F. Supp. 770 (N.D. Ill. 1982); Life Science Church v. Vocke, 531 F. supp. 790 (E.D. Wis. 1982).



The plaintiffs' complaints and their briefs in response to summary judgment suggest that the Department has in some way monitored the plaintiffs' activities for some time in some conspiracy that flourished into the CHINS proceedings, but the plaintiffs have presented neither direct nor circumstantial evidence of these allegations. Rather, as discussed above, those actions of the Department appear in all respects in accordance with the statutory law and directives of the IDPW. The court must therefore find in favor of the defendants on summary judgment with respect to the Section 1985 claims.

A similar analysis applies to the claims under Section 671. That statute does not provide for a private cause of action, so the section 671 claims (as with the others brought by the plaintiffs) must be deemed



raised, if all¹⁷, under Section 1983. In accordance with the Monell line of cases discussed above then, the plaintiffs must establish a connection between the violations alleged and the policies or customs of the Department. Again, Ms. Millspaugh and Ms. Dyson have failed to make this crucial legal connection. 422 U.S.C. Section 671 sets forth requirements for state agencies in their administration of foster care and adoptive assistance programs. In accordance with those federal mandates, the IDPW manual gives specifics requirements for the development of a case plan as part of CHINS proceedings

17 That Section 671 creates a statutory right on the parent's behalf, as opposed to the child's behalf, is not intuitively obvious. Nonetheless, the Department has not challenged the plaintiffs' section 671 claims on standing grounds, so the court will assume , without hold, that these plaintiffs may maintain such claims.



in the State of Indiana. Specifically, Section 306 of that manual provides for the completion of case plans within sixty days after detention of the children and for various other items that should be discussed and evaluated as a part of the case plan.

The plaintiffs' claims under Section 671 are basically three-fold: (1) that the Department failed to complete the case plan within the required time period; (2) that the plaintiffs were not provided with copies of the case plans upon its completion or involved in their preparation; and (3) that the final case plans were inadequate in their description of services offered as an alternative to removal of the children. The untimeliness of completion and provision of copies to the plaintiffs



arose from the plaintiff's absence from the Wabash County area during the early pendency of the CHINS proceedings. Hence any delays on the Department's part in providing the report to the plaintiffs or failure to include them in the completion are not attributable to the conduct of the Department. Additionally, any delays or inadequacies were anomalies, not inaccordance with departmental policy, and not actionable under Section 1983.

With regard to the third of the Section 671 claims, the plaintiffs apparently fault the Department for failing to invoke certain emergency procedures under IDPW manual Section 306.621 for immediate return of the children, including: provision of a substitute emergency caretaker, counseling services, and emergency shelters. To the



extent that the Department did not attempt to apply these procedures as an alternative to removal, its actions were not in accordance with departmental policy and hence raise no actionable claim under Section 1983. If, however, the officials of the Department simply determined that the alternative procedures were inadequate in these cases (particularly given the flight of the Millspaugh and Dyson families), those determinations would have been within the Department's province on a case-by-case basis as a part of the CHINS investigative proceedings. The plaintiffs have not demonstrated how the determinations made in these cases established policy or, for that matter, were unreasonable in any respect. AS with the other claims under Section 1983, the plaintiffs have against failed to meet their burden on summary judgment with respect to those assertions



made in reliance on 42 U.S.C. Section 671.

VI. Conclusion

for all of the foregoing reason, the court hereby GRANTS the motions for summary judgment of defendants Manetta Tucker and the Wabash County Department of Public Welfare with respect to all claims brought by the plaintiffs and DISMISSES these actions.

SO ORDERED.

ENTERED: _____

Robert L. Miller, Jr., Judge
United States District Court

COPY TO:

J. Johnston/D. Lehman
M. Mawby Chipman/J. Lorber
G. Lyman
Order Book



42 U.S.C. Section 671

Section 671. State plan for foster care and adoption assistance.

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which--

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance payment in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in



effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at the State of local level assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provisions of Federal law;

(5) provides that the State will, in the administration of its programs under this part, use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall

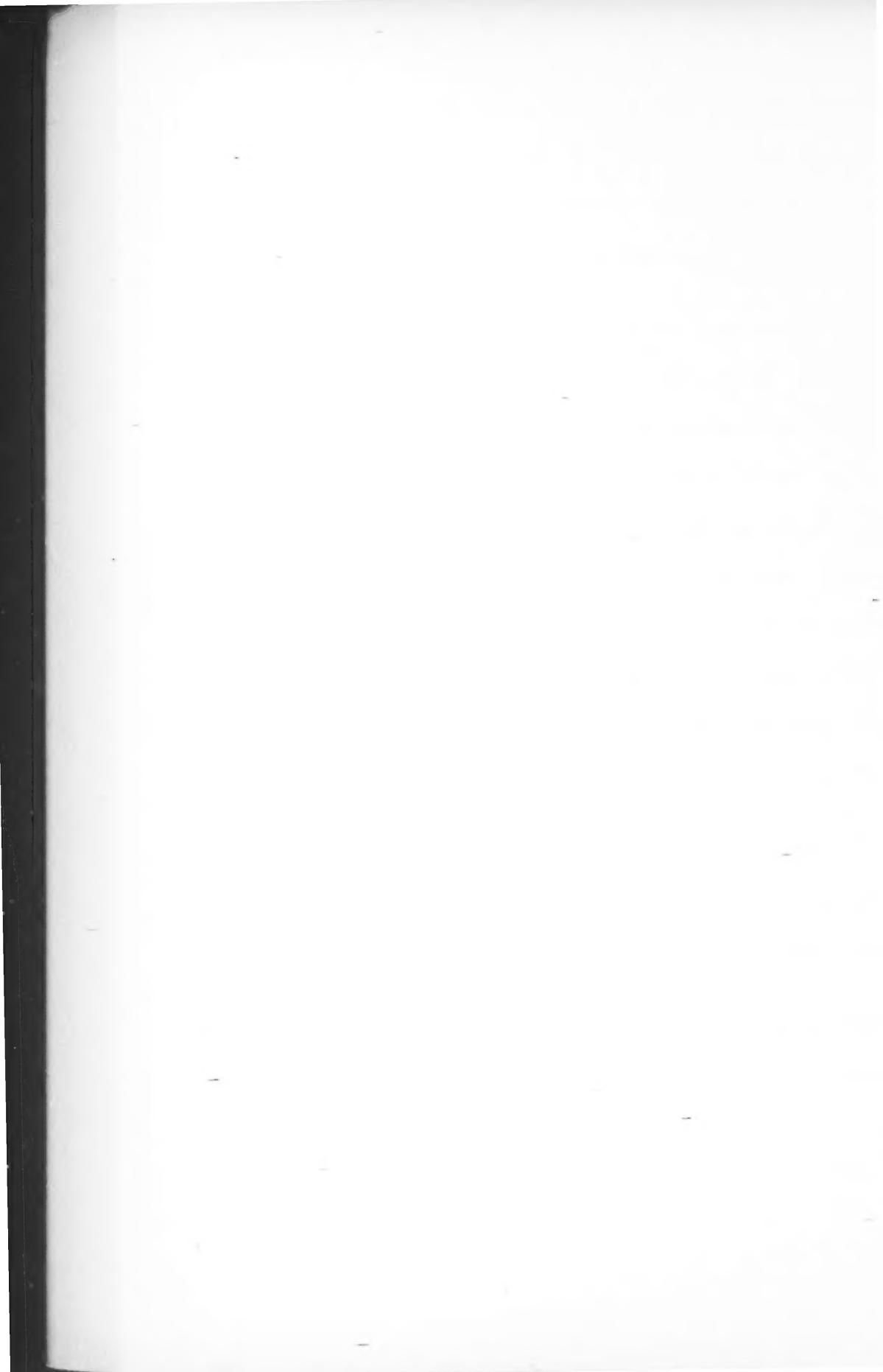


exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part;

(8) provides safeguards which restrict the use of or disclosure of information con-



cerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, C, or D of this subchapter or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (b) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (c) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, and (d) any audit or similar activity conducted in connection with the administration of



any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in



part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institution which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any

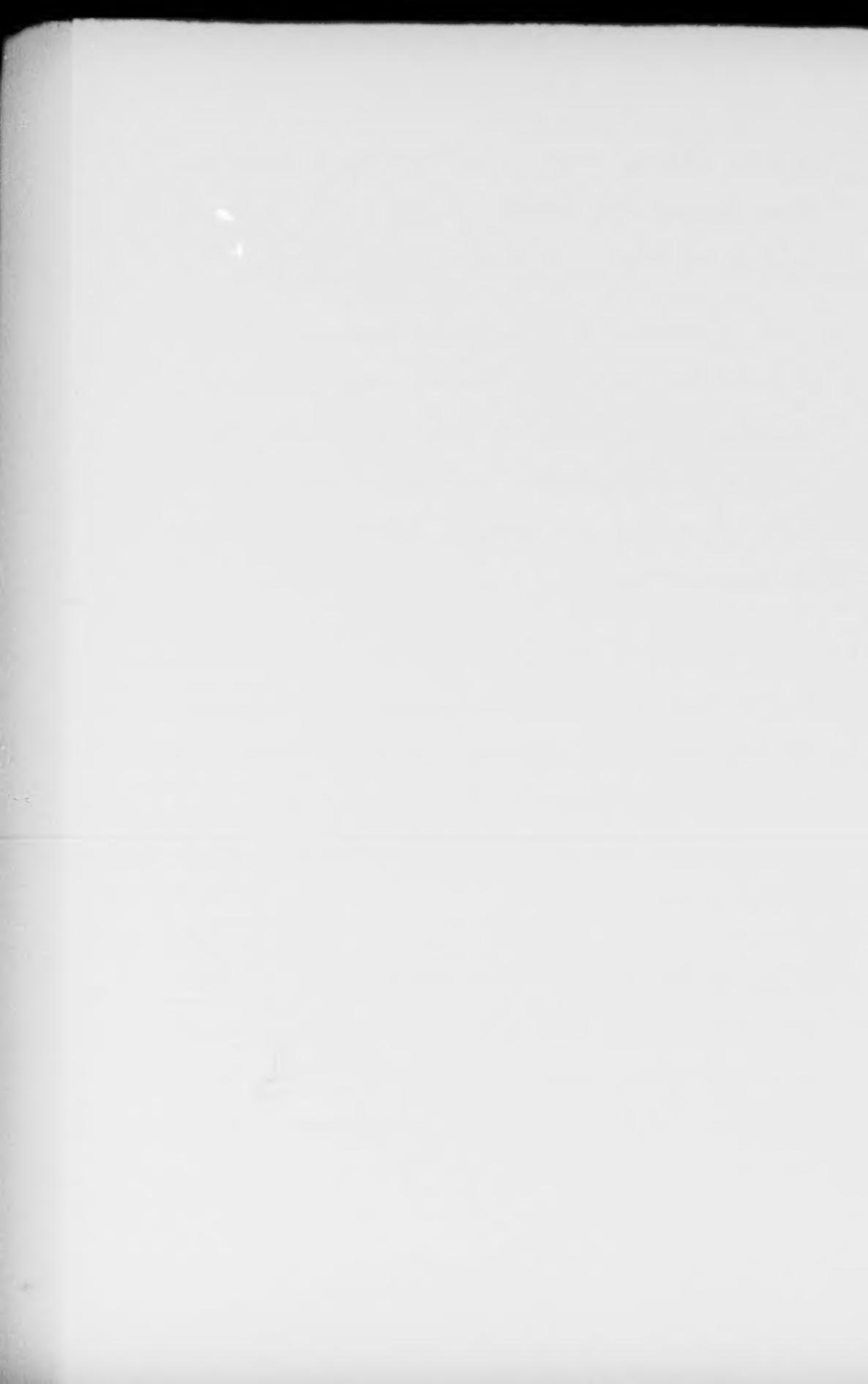


foster family home or child care institution receiving funds under this part of part B of this subchapter.

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance payments to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

(13) provides that the State shall arrange for a periodic and independently conducted audit of the programs assisted under this part and part B of this subchapter, which



shall be conducted no less frequently than once every three years;

(14) provides (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will



be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home; and

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meet the requirements described in section 675(5)(B) of this title with respect to each such child.

(b) Failure of State to comply with plan provisions

The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section. However, in any case in which the Secretary finds, after reason-



able notice and opportunity for a hearing, that a State plan which has been approved by the Secretary no longer complies with the provisions of subsection (a) of this section, or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State under this part, or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and until he is so satisfied he shall make no further payments to the State, or shall reduce such payments by the amount specified in his notification to the State.

(Aug. 14, 1935, c. 531, Title IV, Section



471, as added June 17, 1980, Pub.L. 96-272,
Title I, Section 101(a)(1), 94 Stat. 501,
and amended Aug. 13, 1981, Pub.L. 97-35,
Title XXIII, Section 2353(r), 95 Stat. 874;
Sept. 3, 1982, Pub.L. 97-248, Title I,
Section 160(d), 96 Stat. 400).

MILLS4

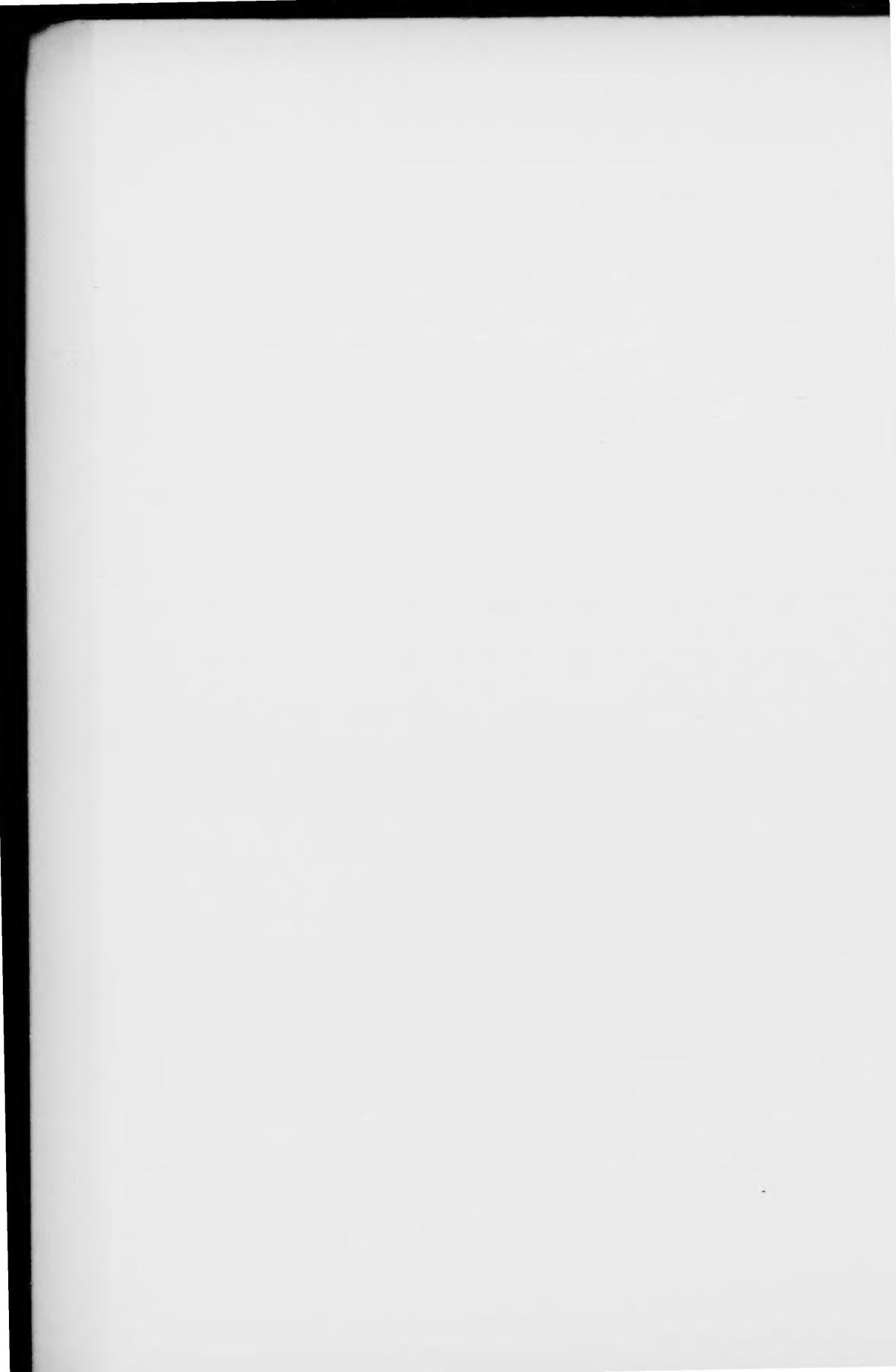


42 U.S.C. Section 675

Section 675. Definitions

As used in this part or part B of this subchapter:

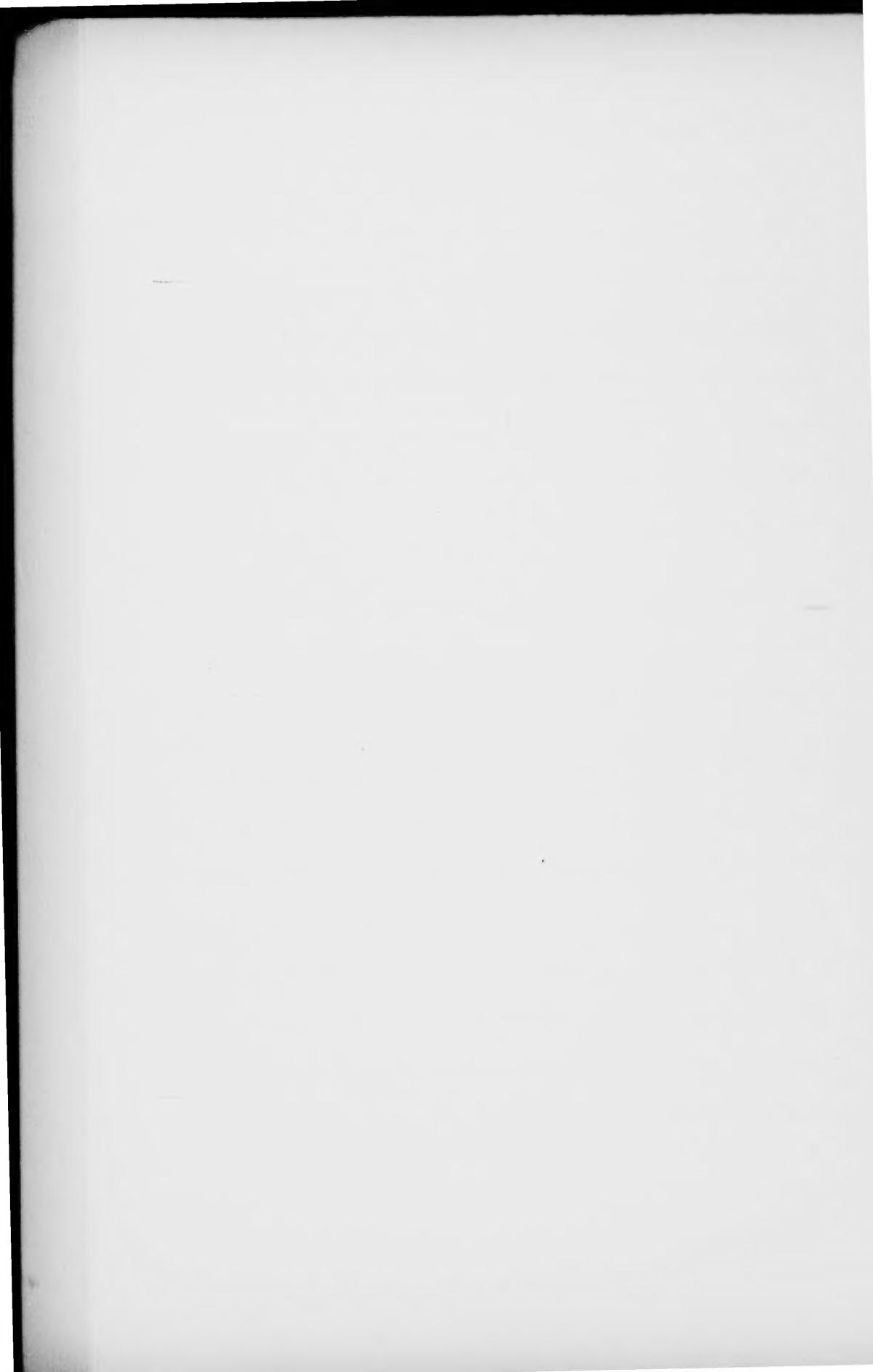
- (1) The terms "case plan" means a written document which includes at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title; and a plan for assuring that the child receives proper care and that services are provided to the parents,



child, and foster parents in order to improve the conditions in the parent's home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

(2) The term "parents" means biological or adoptive parents or legal guardians, as determined by applicable State law.

(3) The terms "adoption assistance agreement" means a written agreement, binding on the parties to the agreement, between the State agency, other relevant agencies, and the prospective adoptive parents of a minor child which at a minimum (A) specifies the amounts of the adoption assistance payments and any additional services and assistance



which are to be provided as part of such agreement, and (B) stipulates that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time. This agreement shall contain provisions for the protection (under an interstate compact approved by the Secretary or otherwise) of the interests of the child in cases where the adoptive parents and child move to another State while the agreement is effective.

(4) The term "foster care maintenance payments" means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. In the case of insti-



tutional care, such terms shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

(5) The term "case review system" means a procedure for assuring that--

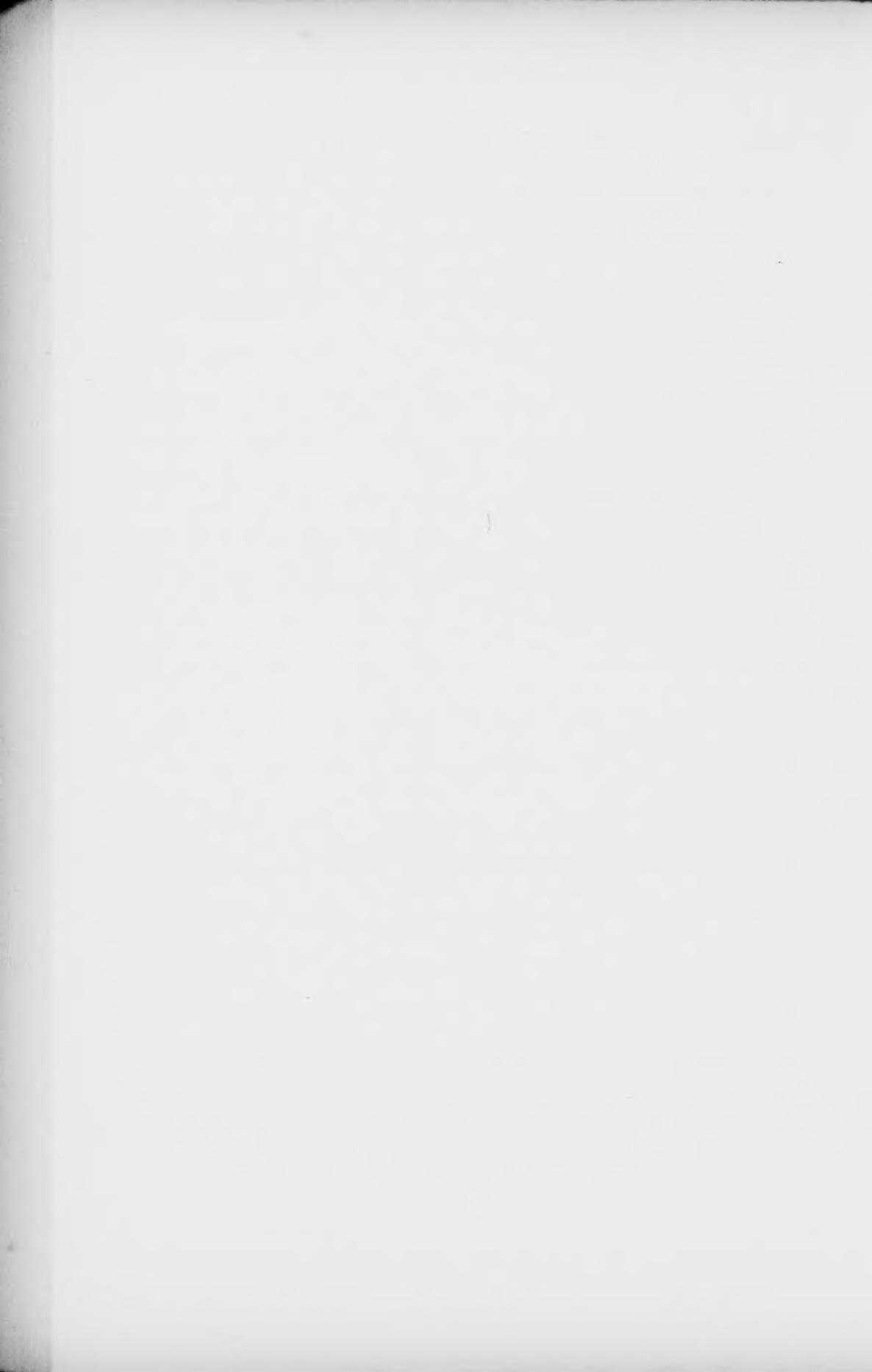
(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the continuing necessity for and appropriate-



ness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship, and

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of



foster care), which hearing shall determine the future status of the child (including, but no limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis); and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.

(6) The term "administrative review" means a review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom

}



is not responsible for the case management of, or the delivery of services to, either the child of the parents who are the subject of the review.

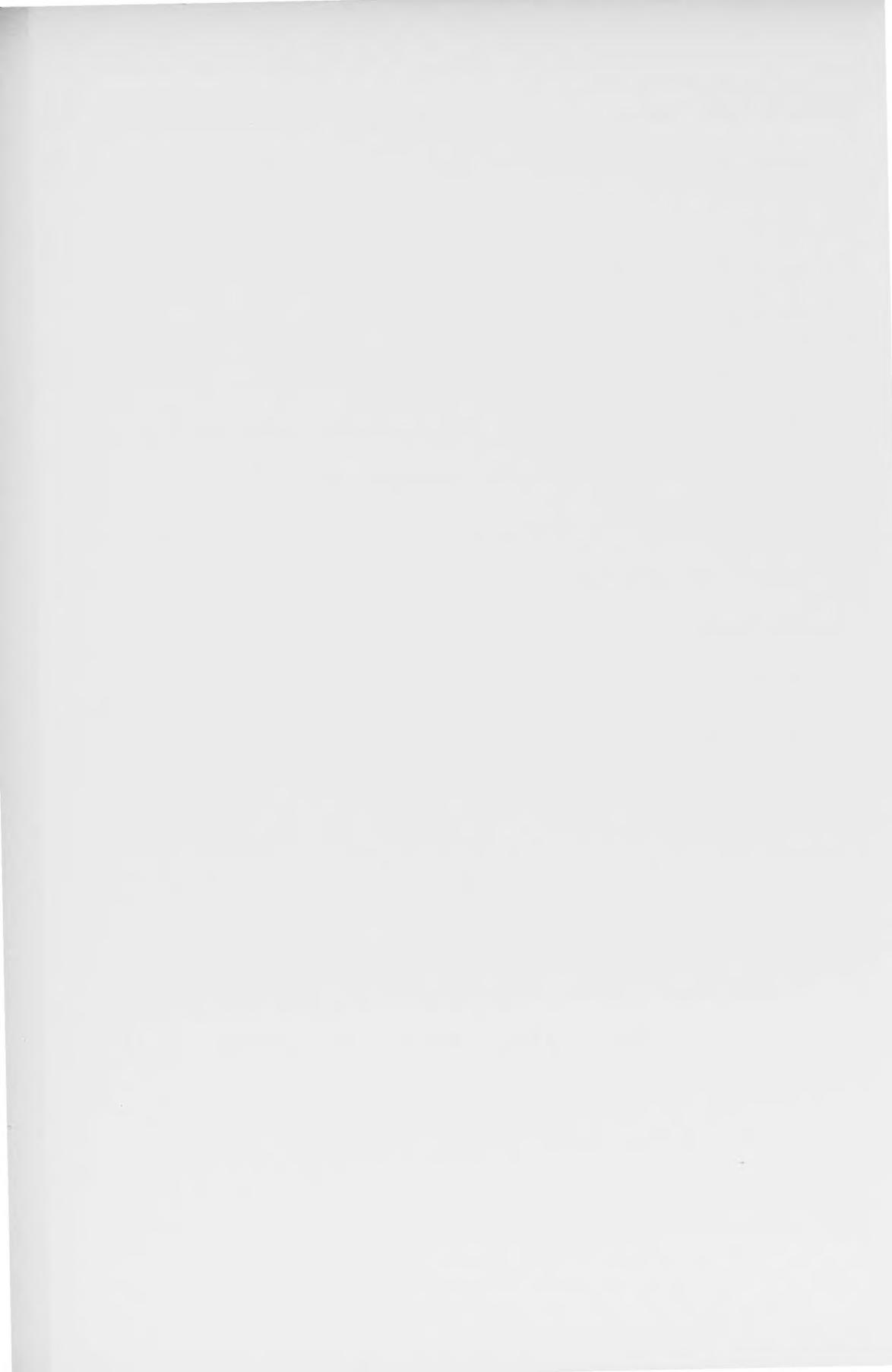
(Aug. 14, 1935, c. 531, Title IV, Section 475, as added and amended June 17, 1980, Pub.L. 96-272, Title 1, Subsection 101(a)(1), 102(a)(4), 94 Stat. 510, 514.)

MILLS5



Indiana Code 12-1-4-1 Powers and duties;
exercise of powers

Sec. 1. Whenever, by any of the provisions of this act, or of any other act, any rights, power or duty is imposed or conferred on the state department of public welfare or the county department of public welfare, the right, power or duty so imposed or conferred shall be possessed and exercised by the administrator and directs or divisions, or the county director as the case may be, unless otherwise provided in this act; and whenever, by any of the provisions of this act, or of any other act, any right, power or duty is imposed or conferred on the state board of public welfare or the county board of public welfare, the right, power or duties so imposed or conferred shall be possessed and exercised by the state board of public



welfare or the county board of public welfare, as the case may be, unless otherwise provided in this act or unless any such right, power or duty is delegated to the duly appointed agents or employees of such department, or any of them, by an appropriate rule, regulation or order of the state board or the county board.

(3)
No. 91-632

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

LOIS MILLSPAUGH and TINA DYSON,
Petitioners,

v.

COUNTY DEPARTMENT OF PUBLIC WELFARE
OF WABASH COUNTY, et.al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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of Wabash County

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Respondent, County Department of Public Welfare of Wabash County, respectfully disagrees with petitioners' statement of the questions presented for review. The following is submitted as a more accurate statement of the questions presented with respect to the County Department of Public Welfare of Wabash County.

Whether Millspaugh and Dyson have sustained their burden of establishing a genuine issue of material fact regarding the existence of an unconstitutional policy, procedure, custom, or practice of the Wabash County Department of Public Welfare.

Whether Millspaugh and Dyson have failed to establish a genuine issue of material fact regarding whether any action taken by the social worker and director was a cause of their alleged constitutional deprivations.

Whether Millspaugh and Dyson failed to preserve any error with regard to the District Court's entry of summary judgment.

PARTIES TO THE PROCEEDINGS

The following parties were involved in the underlying proceedings:

Lois Millspaugh (petitioner)

Tina Dyson (petitioner)

County Department of Public Welfare of
Wabash County (respondent)

Manetta Tucker (respondent)

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The petition should be denied because Mill- spaugh ⁸ and Dyson have failed to sustain their burden of establishing a genuine issue of material fact regarding the existence of an unconstitutional policy, procedure, custom or practice of the Wabash County Department of Public Welfare.	7

The petition should be denied because Millspaugh and Dyson have failed to establish a genuine issue of fact regarding whether any action taken by the social worker and the director was a cause of their alleged constitutional deprivations.	14
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Respondent, County Department of Public Welfare of Wabash County (hereinafter referred to as "DPW"), respectfully requests this Court to deny the pending petition for writ of certiorari in which petitioners are seeking review of the opinion issued by the United States Court of Appeals for the Seventh Circuit. The opinion of the Court of Appeals is set forth verbatim by petitioners in the appendix to petitioners' petition for writ of certiorari filed herein (Appendix at pp. 2-21). DPW accepts the sections of Millspaugh and Dyson's petition entitled Opinions Below (petition at p. 6), and Jurisdictional Grounds (petition at p. 6).

◆ ◆ ◆

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

DPW does not accept Millspaugh and Dyson's statement of constitutional and statutory provisions involved. The issues raised with respect to DPW do not involve any constitutional or statutory provisions. DPW was granted a summary judgment in this case due to petitioners' failure to sustain their burden of establishing a genuine issue of material fact with respect to either the existence of an unconstitutional policy, procedure, custom

or practice of the DPW or causation between any actions taken by the social worker and the director and the alleged constitutional deprivations. Additionally, petitioners failed to establish any constitutional deprivation resulting from the actions of the social worker, the director or the DPW.

STATEMENT OF THE CASE

DPW does not accept petitioners' statement of the case as being complete and accurate. Therefore, the DPW offers the following supplement to the statement of the case for the Court's consideration:

The Indiana Department of Public Welfare established a manual for child welfare/social services which was released to county welfare departments effective September 30, 1983. The policies and procedures contained in the manual were in effect during the year 1984. The policies and procedures for the handling of CHINS (Children in Need of Services) cases are set forth in the manual. In addition to the policies set forth in the manual, the Indiana Department of Public Welfare also promulgates policies and procedures for the county departments of public welfare through regulations published in the Indiana

Administrative Code and informal directives such as letters and bulletins.

The Wabash County Department of Public Welfare used the manual as its own policies and procedures for the handling of CHINS cases in 1984 and all years thereafter. The manual contains references to various state statutes as a legislative basis for the policies set forth therein. In 1984 and all years thereafter, the DPW expected and instructed its case workers and employees to follow the procedures published by the Indiana Department of Public Welfare with respect to the handling of CHINS cases. Likewise, the DPW expected and required its employees and case workers to comply with the state statutes governing CHINS cases. In 1984 and all years thereafter, the DPW employed an attorney, Stephen H. Downs, to guide and assist its employees and case workers in complying with the laws and state procedures for handling CHINS cases. It is not, and was not, the policy of the DPW to establish any policies or procedures contrary to, or inconsistent with, the policies and procedures set by the state for dealing with CHINS cases.

The District Court granted summary judgment in favor of the DPW on several grounds. The Court first noted that there was no evidence to suggest that the DPW

failed to follow the proper procedures in its conduct of the investigations and institution of proceedings. The court concluded that, to the contrary, the evidence suggested that the investigation was conducted as best as practicable under the circumstances. The District Court also concluded that Millspaugh and Dyson failed to establish a genuine issue of material fact regarding the existence of an unconstitutional policy, procedure, custom or practice of DPW. Finally, the District Court ruled that Millspaugh and Dyson had failed to demonstrate any causal connection between the DPW's policies and any alleged constitutional deprivations.

The Seventh Circuit Court of Appeals affirmed the District Court's summary judgment in favor of the DPW. The Court of Appeals agreed that Millspaugh and Dyson failed to identify an unconstitutional policy of the DPW and failed to show how the application of such an unconstitutional policy caused their injury.

◆

SUMMARY OF THE ARGUMENT

Policy, Procedure, Custom or Practice

The uncontested evidence establishes that the policies and procedures of the Wabash County Department

of Public Welfare are established by legislative enactments, administrative regulations and a manual issued by the Indiana Department of Public Welfare. The DPW's actions with respect to a CHINS hearing are completely circumscribed by the statutory and regulatory scheme. Millspaugh and Dyson have failed to sustain their burden of establishing that any deviation from the official policies and procedures constituted a policy, custom or practice of the DPW.

Causation

Causation is an essential element of a § 1983 cause of action. The District Court correctly ruled that Millspaugh and Dyson failed to establish a causal connection between any action of the DPW and their alleged constitutional deprivations.

Waiver

Millspaugh and Dyson have failed to preserve any errors with respect to the District Court's entry of summary judgment. The brief filed with the Seventh Circuit Court of Appeals failed to specifically challenge any portion of the District Court's memorandum and order. Additionally, Millspaugh and Dyson failed to challenge the District Court's ruling with regard to causation in the direct appeal to the Court of Appeals.

◆

ARGUMENT

I.

**THE PETITION SHOULD BE DENIED
BECAUSE THE ONLY ISSUE RAISED
WITH RESPECT TO THE DPW IS
WHETHER BOTH THE DISTRICT
COURT AND THE COURT OF
APPEALS ERRED IN RULING THAT
MILLSPAUGH AND DYSON FAILED
TO SUSTAIN THEIR BURDEN OF
PROOF IN OPPOSING A MOTION
FOR SUMMARY JUDGMENT.**

Rule 10 of the Rules of the Supreme Court of the United States provides that a petition for writ of certiorari will be granted "only when there are special and important reasons therefor." There are no special or important reasons for granting the petition in the case now before this Court. The petition does not challenge the constitutionality of any statute or regulation of the DPW. Furthermore, the issues raised with respect to the DPW do not involve conflicting opinions between the Seventh Circuit Court of Appeals and another circuit court of appeals. The issue raised with respect to the DPW involves only the question of whether petitioners sustained their burden of establishing a genuine issue of material fact in opposing a motion for summary judgment. There is no dispute between the parties as to the applicable law, nor do petitioners

challenge the Court of Appeals' statement of the applicable law with respect to the judgment entered in favor of DPW.

II.

**THE PETITION SHOULD BE DENIED
BECAUSE MILLSPAUGH AND DYSON
HAVE FAILED TO SUSTAIN THEIR
BURDEN OF ESTABLISHING A
GENUINE ISSUE OF MATERIAL FACT
REGARDING THE EXISTENCE OF AN
UNCONSTITUTIONAL POLICY,
PROCEDURE, CUSTOM OR
PRACTICE OF THE WABASH
COUNTY DEPARTMENT OF PUBLIC
WELFARE.**

The uncontroverted evidence before the District Court established that the Indiana Department of Public Welfare established a manual for child welfare/social services which was released to county welfare departments effective September 30, 1983. The policies and procedures contained in the manual were in effect during the year 1984. The policies and procedures for the handling of CHINS cases are set forth in the manual. In addition to the policies and procedures set forth in the manual, the Indiana Department of Public Welfare also promulgates policies and procedures for the county departments of public welfare through regulations published in the Indiana

Administrative Code and informal directives such as letters and bulletins.

The Wabash County Department of Public Welfare used the manual as its own policies and procedures for the handling of CHINS cases in 1984 and all years thereafter. The manual contains references to various state statutes as a legislative basis for the policies set forth therein. In 1984 and all years thereafter, the DPW expected and instructed its case workers and employees to follow the procedures published by the Indiana Department of Public Welfare for handling CHINS cases. Likewise, the DPW expected and required its employees and case workers to comply with the state statutes governing CHINS cases. In 1984 and all years thereafter, the DPW employed an attorney, Stephen H. Downs, to guide and assist its employees and case workers in complying with the laws and state procedures for handling CHINS cases. It is not, and was not, the policy of the DPW to establish any policies or procedures contrary to, or inconsistent with, the policies set by the state for dealing with CHINS cases.

Millspaugh and Dyson are not challenging the constitutionality of any of the legislative enactments or promulgated regulations. Millspaugh and Dyson contend only that the departure from the established policies and

procedures by Tucker and Judy Mason, Tucker's supervisor, deprived Millspaugh and Dyson of their constitutional rights. Millspaugh and Dyson's claims are based solely upon alleged deviations from the statutory and administrative policies and procedures.

It is now beyond dispute that a government agency is not liable under 42 U.S.C. § 1983 on the theory of *respondeat superior*. In order to establish governmental liability, Millspaugh and Dyson must allege and prove that the alleged deprivations of their constitutional rights were caused by a formal policy, procedure, custom or practice of the governmental agency. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978); *Gray v. Dane County*, 854 F.2d 179 (7th Cir. 1988); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) cert. den. 489 U.S. 1065 (1989); *Rascon v. Hardiman*, 803 F.2d 269 (7th Cir. 1986).

In light of Millspaugh and Dyson's failure to challenge the constitutionality of any of the statutory or administrative policies and procedures of the DPW, the issue in this case is whether any deviation from the official policies or procedures constitutes a sufficient custom or practice to establish liability on behalf of the DPW. It is respectfully submitted to the Court that due to the tightly

circumscribed nature of a county department's discretion, a deviation from the official policy or procedure is random and unauthorized and therefore not a policy, procedure, custom or practice of the DPW itself.

Millspaugh and Dyson concede that their claims against the DPW are based solely upon the DPW director's personal involvement in the investigation and decision to remove the children and her continued review and approval of Tucker's actions. Millspaugh and Dyson contend that an Indiana statute, I.C. 12-1-4-1, which provided that the county director possessed and exercised any of the rights, power or duties imposed or conferred on the county department establishes that the actions of a department director are sufficient to establish the official policy or procedure for the DPW. A review of the relevant case law, however, establishes that Millspaugh and Dyson's argument is without merit.

The DPW does not dispute the fact that even a single decision taken by a governmental official with policymaking authority may give rise to liability under § 1983. However, it is clear that not every act of a policymaking official gives rise to liability on behalf of the governmental agency. This Court clarified the type of decision which would give rise to liability in *Pembaur v.*

City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452 (1986). In ruling that liability could attach only where a deliberate choice to follow a course of action is made from among various alternatives by an official responsible for establishing the final policy, the Court cautioned that not every decision of a policymaking official gives rise to municipal liability based on the exercise of the official's discretion.

In the case now before this Court, although I.C. 12-1-4-1 provided that rights, power or duty imposed or conferred on the DPW shall be possessed and exercised by the county director, those rights, powers and duties are completely circumscribed by the formalized policy and procedure set forth in the applicable statutes, regulations and manuals. The statute merely provided the director the rights, power and duties to enforce the officially enacted policies and procedures.

The evidence is uncontested that the manual issued by the Indiana Department of Public Welfare pursuant to its responsibility to supervise the child welfare programs administered by county departments was used by the DPW as its own policies and procedures. Indiana Code 12-1-4-1 does not give the director of a county department of public welfare carte blanche to reject and deviate from

the official policies and procedures set forth in the applicable statutes, regulations and manuals. In this respect, the director of a county department of public welfare does not have any alternatives from which to choose regarding policy decisions. Those decisions have been made and formalized by the enactment of the statutes and regulations and the use of the manuals.

Recent case law establishes that a governmental agency is not liable under § 1983 for unlawful deviations from official policies and procedures even if those deviations were made by a person with policymaking authority. Specifically, the Seventh Circuit Court of Appeals rejected such an argument in *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) *cert. den.* ____ U.S. ___, 111 S. Ct. 783 (1991), in situations in which, although an official has the authority and discretion to effect deprivation of constitutional rights, that discretion is "circumscribed" by statutory or other predeprivation procedural safeguards. In an *en banc* decision rendered specifically in light of this Court's ruling in *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L.Ed.2d 100 (1990), the Court of Appeals ruled that in such a situation, the state official's abuse of discretion was not predictable and was therefore random and unauthorized. The governmental agency is not liable,

pursuant to § 1983, for such random and unauthorized actions.

The Seventh Circuit Court of Appeals also discussed in detail the relationship between the circumscribed discretion of a policymaking official and the random and unauthorized deviation from policy. The Court of Appeals ruled that where formal policies and procedures are set in place, a deviation does not establish a new policy or procedure. *Easter House v. Felder, supra*, 910 F.2d at 1402-1403.

In the case now before this Court, Millspaugh and Dyson request the Court to ignore the formal statutes and regulations and to rule that, despite the formal policies and procedures, any deviations established the policy, custom and practice of the Department to be applied in the case. It is uncontested, however, that the state formalized its policies and procedures through in-depth statutes and regulations. The rights, power and duties under the statutes and regulations are delegated to the county departments of public welfare and the county director. The county departments and director, however, have no authority to make policy in contravention of the formal state policies or to even deviate from the formal state policies. Therefore, the single incident involving the Millspaugh and Dyson

children cannot constitute a policy, procedure, custom or practice. In light of the fact that Millspaugh and Dyson have come forth with absolutely no evidence to establish that there have been any repeated deviations from the formally established policy and procedure, the trial court properly determined that any deviation by Tucker or Mason did not constitute a policy, procedure, custom or practice of the Wabash County Department of Public Welfare.

III.

THE PETITION SHOULD BE DENIED BECAUSE MILLSPAUGH AND DYSON HAVE FAILED TO ESTABLISH A GENUINE ISSUE OF FACT REGARDING WHETHER ANY ACTION TAKEN BY THE SOCIAL WORKER AND THE DIRECTOR WAS A CAUSE OF THEIR ALLEGED CONSTITUTIONAL DEPRIVATIONS.

It is well established that in order to prevail in a § 1983 action, a plaintiff must establish a causal connection between the alleged denial of due process and any injury suffered. In this regard, the principles of tort causation apply to constitutional torts as well as to other tort suits. *Lossman v. Pekarske*, 707 F.2d 288 (7th Cir. 1983). See generally, *Mazanec v. North Judson-San Pierre School Corp.*, 798 F.2d 230 (7th Cir. 1986); *Muckway v. Craft*,

789 F.2d 517 (7th Cir. 1986). The District Court properly found that Millspaugh and Dyson did not demonstrate a causal connection between inadequate service and their alleged deprivations.

The uncontroverted evidence establishes that Millspaugh and Dyson had actual notice of the hearings involving their children. Despite such notice, they purposely chose not to attend the hearings and submit evidence. The evidence further establishes that once Millspaugh and Dyson retained an attorney who attended the hearings on their behalf, the children were returned to their mothers. Any injury alleged by Millspaugh and Dyson is therefore not a result of inadequate service, but rather, their own failure to attend the hearings.

The District Court also correctly determined that many of the actions which Millspaugh and Dyson challenge as unconstitutional cannot be attributed to the DPW. Specifically, Millspaugh and Dyson do not challenge the District Court's finding that it was the officer who detained the children who was charged with the responsibility of providing notice of post-deprivation hearings to Millspaugh and Dyson. Assuming *arguendo* that the officer did not fulfill his responsibility of providing notice, it was not the action of the DPW which prevented the officer from

providing proper notice. Similarly, the failure of a police officer to give proper notice is not in accordance with the policy and procedures dictated by the statutes and regulations governing the DPW.

Millspaugh and Dyson also fail to challenge the District Court's finding that the scheduling of the CHINS proceedings and subsequent notice of the rescheduling of the proceedings are matters within the discretion of the state trial court, not the DPW. Millspaugh and Dyson, therefore, have failed to establish that any problems in the scheduling of the proceedings, or subsequent notice, were attributable to the DPW.

In summary, Millspaugh and Dyson have failed to sustain their burden of establishing any action taken by the DPW which caused any injury to them. On the contrary, the uncontested evidence establishes that any injury was caused not only by the actions of people outside the DPW, but also by Millspaugh and Dyson themselves. In light of the uncontested evidence, the District Court committed no error in entering summary judgment in favor of the DPW.

IV.

THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS FAILED TO PROPERLY PRESERVE ANY ERROR IN THEIR DIRECT APPEAL TO THE COURT OF APPEALS.

The District Court judge, in accordance with Rule 50 of the Rules of the Seventh Circuit Court of Appeals, stated his reasons for granting summary judgment in a written statement. Millspaugh and Dyson did not specifically challenge any of the trial court's findings, conclusions or reasoning in their appeal to the Seventh Circuit Court of Appeals. Instead, Millspaugh and Dyson essentially relied upon the memorandum they filed in opposition to the motions for summary judgment in the District Court. The Seventh Circuit Court of Appeals has previously ruled that a party complaining of error in the findings of a trial court must demonstrate the error with something more than general assertions. In *George E. Hoffman & Sons, Inc. v. International Brotherhood of Teamsters*, 617 F.2d 1234 (7th Cir. 1980) cert. den. 449 U.S. 937 (1980), the Court of Appeals stated that a reviewing court will not make its own search of the record to determine whether such general assertions of error are supportable.

In light of Millspaugh and Dyson's failure to specifically challenge any portion of the District Court's memo-

random and order, they essentially requested the Court of Appeals to search the record in an attempt to find error. Such action fails to preserve any error in the Court of Appeals.

Similarly, Millspaugh and Dyson have waived any issue with respect to the causation of their alleged damages. The District Court, in its memorandum and order, noted that the DPW argued in its motion for summary judgment that Millspaugh and Dyson had failed to demonstrate causation of any constitutional or civil rights injury in light of their failure to appear at proceedings concerning the children and that any right to be heard was waived by their failure to appear. The District Court noted that Millspaugh and Dyson "make no specific response to these assertions."

The District Court also ruled that Millspaugh and Dyson failed to demonstrate any damage resulting from the failure to serve process because the record indicated Millspaugh and Dyson had actual knowledge of the proceedings. The District Court noted that Millspaugh and Dyson did not demonstrate a causal connection between inadequate service and their alleged deprivations.

Millspaugh and Dyson failed to address the causation issues in their direct appeal to the Court of Appeals.

Their statement of the issues did not support any alleged error with regard to the District Court's ruling that Millspaugh and Dyson failed to establish causation. Similarly, the argument section of the brief in the Court of Appeals did not include any contention that the District Court erred in its ruling regarding causation.

Rule 28 of the Federal Rules of Appellate Procedure requires the appellant to set forth a statement of the issues presented for review together with an argument that contains the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record upon which the appellant relies. The Seventh Circuit Court of Appeals has ruled that an appellant's failure to set forth the issues or argument as required by Rule 28 results in a waiver of any issues not presented. *Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192 (7th Cir. 1989); *F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1989); *Bonds v. Coca-Cola Company*, 806 F.2d 1324 (7th Cir. 1986).

It is well settled that a plaintiff in a § 1983 action must allege and establish causation as an element of the cause of action. *Muckway v. Craft*, 789 F.2d 517 (7th Cir. 1986); *Garza v. Henderson*, 779 F.2d 390 (7th Cir. 1985).

Since Millspaugh and Dyson did not challenge the trial court's ruling that they failed to establish the requisite causation, they waived the issue. This waiver would have justified the affirmance of the District Court's order by the Court of Appeals.

CONCLUSION

The issues raised with respect to the DPW do not support a grant of the petition for writ of certiorari. Contrary to the broad constitutional allegations contained in the petition, the District Court and the Seventh Circuit Court of Appeals, decided this case on the procedural grounds contained in Federal Rule of Civil Procedure, Rule 56. Pursuant to Rule 56, the trial court's entry of summary judgment can be sustained on three separate and distinct grounds. First, Millspaugh and Dyson have failed to establish any constitutional violation. Second, Millspaugh and Dyson have failed to create a genuine issue of material fact with regard to any policy or procedure of the DPW which led to a constitutional deprivation. Finally, Millspaugh and Dyson have failed to establish that any policy or procedure of the DPW caused a constitutional depriva-

tion. The Court of Appeals correctly ruled that Millspaugh and Dyson failed to identify an unconstitutional policy or to show how an unconstitutional policy caused their injury.

WHEREFORE, respondent, the County Department of Public Welfare of Wabash County, respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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(4)

NO. 91-632

Supreme Court, U.S.
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NOV 13 1991

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LOIS MILLSPAUGH and TINA DYSON,

Petitioners

v.

COUNTY DEPARTMENT OF
PUBLIC WELFARE OF WABASH
COUNTY and
MANETTA TUCKER

Respondents

BRIEF IN OPPOSITION TO THE PETITION
FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a caseworker entitled to absolute immunity under 42 U.S.C. 1983 for initiation of child in need of services proceedings, testimony at the proceedings and activities related to presenting the case for decision by a State Court?

2. For any activities which are not protected by absolute immunity, did the caseworker act in an objectively reasonable manner or knowingly violate the law?

* All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption. Defendant, Manetta Tucker, was formerly known as Manetta Abshear.

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**I. CITATIONS OF THE
OPINIONS AND JUDGMENTS
DELIVERED IN THE COURTS BELOW.**

The Opinion of the United States Court of Appeals for the Seventh Circuit was issued on July 15, 1991 and is reported as follows:

Lois Millspaugh and Tina Dyson vs. County Department of Public Welfare of Wabash County, et al., 937 F.2d 1172 (7th Cir. 1991).

The decision of the United States District Court for the Northern District of Indiana, South Bend Division, Robert L. Miller, Jr., Judge, is reported as follows:

Lois Millspaugh and Tina Dyson vs. County Department of Public Welfare of Wabash County, et al., 746 F.Supp. 832 (N.D. Ind. 1990)

II. STATEMENT OF JURISDICTION

The Petitioners brought an action in the District Court pursuant to 42 U.S.C. 1983 against the County Welfare Department and caseworker alleging jurisdiction under 28 U.S.C. 1331. The Petitioners alleged a violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution. The District Court entered Summary Judgment and a final judgment in favor of both Defendants and against the Petitioners. This judgment was appealed to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit entered its decision on July 15, 1991 affirming the District Court's judgment. The Petitioners filed a Petition for Writ of Certiorari in this Court on October 15, 1991. This Court has the

discretion to hear this matter pursuant to 28 U.S.C. 1254(1).

III. THE CONSTITUTIONAL STATUTORY PROVISIONS

The constitutional statutory provisions are set out in Petition for Writ of Certiorari.

IV. STATEMENT OF THE CASE

Respondent asserts that there are omissions and inaccuracies in the Petitioner's Statement of the Case and therefore submits an entire Statement of the Case as a part of this Brief. These facts are taken from a combined summary of the facts given by the District Court and Circuit Court of Appeals found in Petitioner's Appendix.

A. INVESTIGATION AND FILING OF THE CHINS PETITION.

Manetta Tucker was a caseworker for the Wabash County Welfare

Department during the relevant dates related to this action. Ms. Tucker's responsibilities included investigation, initiation and processing of child in need of services petitioners (CHINS). (App. 24) The Department received a complaint concerning the children of Lois Millspaugh and Tina Dyson. The investigation began with an anonymous telephone call on February 2, 1984 reporting that the Petitioners' children were hungry. (App. 4, 26) Ms. Tucker spoke to the schools where the children had enrolled and was told that the girls were taken out of school without any notice as to where the girls were going or how they would be educated. (App. 4, 27) Indeed the Petitioners had made no plans to enroll the children in another school. (App. 3) The Petitioners admitted that they

did not have the money to enroll the children in correspondence school.

Furthermore, they could not explain, even today, how they were going to supply education for the children.

(App. 4, 18, 19, 36)

Ms. Tucker learned that the Petitioners had been living in a group environment in a house on Sivey Street and had stripped the interior of their house so that it was uninhabitable and moved to Kokomo. (App. 3, 27) Manetta Tucker personally visited the residence on Sivey Street and verified that it had been stripped of not only all furniture but even the kitchen sink.

(App. 3, 27) She contacted the Reverend Bob Merrill in Kokomo who told her that the group arrived without money, without food and without clothing except for what they were wearing, indeed, they had nothing but

blankets. (App. 4, 27) the group was housed with the Reverend for a day and moved on to Indianapolis. (App. 4, 28)

On February 8, 1984, Manetta Tucker and the attorney for the Public Welfare Department, Steve Downs, went to Court and filed a petition alleging the Petitioners' daughters to be children in need of services and requested a detention order. (App. 27, 28) The Judge of the Wabash Circuit Court issued the detention order authorizing the temporary removal of the children and permitting their detention until a hearing set for February 10, 1984. (App. 28) The detention order gave the notice for the date and time of the detention hearing. The detention order was teletyped to Indianapolis where the children were picked up by the police and placed in a home. (App. 28) At the time the

children were taken by the police, the Petitioners were shown the detention order. It is not clear whether the Petitioners saw the date and time for the detention hearing. (App. 28) The Petitioners failed to appear for the detention hearing. At the detention hearing the Court found that the welfare of the children required their detention until further order of the Court. (App. 28)

The day after the Petitioners' children were removed, they traveled to Seymour, Indiana, south of Indianapolis, and made no effort to contact the Welfare Department to tell the Department where they were or where they were going. (App. 5, 28, 29)

B. THE PETITIONERS TRAVELED AROUND THE COUNTRY AFTER THEIR CHILDREN WERE DETAINED.

After traveling to Seymour, Indiana, the Petitioners left and went

to Cleveland, Tennessee. (App. 29) Lois Millspaugh called the Welfare Department and spoke to Ms. Tucker on February 17th, nine days after the children were taken, but refused to tell her where they were going and refused to come back and participate in the proceedings. (App. 5, 29, 30) She indicated that the group was traveling under God's direction and that they could receive messages through Paul Wildridge.

After leaving Cleveland, Tennessee, the Petitioners went to Washington, D.C. and thereafter to Virginia Beach, Virginia; Roanoke Rapids, North Carolina; Jacksonville, Florida; Miami, Florida; Key West, Florida; Crystal River, Florida; Tallahasee, Florida; back to North Carolina; back to Virginia; and then to Ohio. (App. 6, 30)

Finally on May 25, 1984, Lois Millspaugh returned to Wabash and met with Manetta Tucker. (App. 34) Tina Dyson did not return at that time. This was the first time that either Petitioner attempted to see her daughters since the detention order on February 8, 1984. On May 25, Ms. Millspaugh also went to the offices of Attorney John Johnston, but Lois Millspaugh did not engage Mr. Johnston's services at that time. (App. 34) Mr. Johnston was employed by the Petitioners in October, 1984 and entered his appearance on December 13, 1984. (App. 37)

C. STATE COURT PROCEEDINGS.

In the detention hearing of February 10, 1984, the Court found that the welfare of the children required their detention until further order of

the home study on Charles Millspaugh and determined that the girls should be placed with their father. On November 30, 1984, the Court scheduled a dispositional hearing for December 14, 1984. The day before John Johnston entered his appearance for both Petitioners and moved for a change of venue from the Judge. (App. 37, 38)

On December 14th, the Court set aside the determinations previously made and set the matter for hearing on December 17th. Contrary to the suggestion in the Petition for Writ, the Court did not make a finding that the Petitioners' constitutional rights had been violated. The Court found that the Petitioners should have been notified by publication pursuant to the Indiana Trial Rules since the Petitioners could not be located to serve them with process. (App. 37)

The United States District Court noted in its decision that publication in Indiana would hardly give them better notice of the hearings as they traveled around the country. (App. 88)

On January 2, 1985, the Honorable Thomas Wright qualified as Judge and assumed jurisdiction. On July 8, 1985, Judge Wright reversed the detention order previously entered and remanded the unemancipated children to their mothers' care. (App. 38)

After John Johnston had entered his appearance on behalf of the Petitioners, both the Petitioners continued to travel. (App. 7, 38, 39)

Lois Millspaugh traveled to Switzerland, England, France, Italy, Greece and Jerusalem. Tina Dyson initially continued traveling but returned to Wabash in May of 1985. Lois Millspaugh continued to travel to

the Court. (App. 28) The initial hearing for both Petitioners was set for March 16th. (App. 31) A summons was sent on March 9th to Paul Wildridge, the individual designated by the Petitioners. The summons was returned on March 12th indicating "not in the bailiwick." (App. 30, 31)

On March 16, 1984, the Court conducted the initial hearings. In the Millspaugh case, Charles Millspaugh appeared at the hearing and denied that the Millspaugh girls were children in need of services. Both of the Petitioners, Lois Millspaugh and Tina Dyson, failed to appear at the hearing for their children. The Court found that they had actual notice of the date and time of the hearing and a finding was made as to the Dyson case, but the fact finding hearing was reset for April 27th on the Millspaugh case since

the father had appeared. (App. 6, 7, 31) Both of the Petitioners admitted that they had actual knowledge of the hearings but chose not to attend. (App. 6, 7, 31, 32) After the hearing, the Petitioners called Manetta Tucker to discuss what had occurred at the hearing. (App. 6, 7 31) Both in this conversation and in later conversations, the Petitioners told Manetta Tucker that they could not return to participate in the Court proceedings. (App. 6, 7, 31)

The fact finding hearing for Tina Dyson was conducted on March 23 and she did not appear. (App. 32, 33) On April 27, 1984, the Court conducted the fact finding hearing for the Millspaugh case and took the matter under advisement pending a home study on Charles Millspaugh. (App. 33) On November 29, 1984, the Court received

Tel Aviv, Amsterdam, Athens, Bangkok, Seoul, Honolulu and Waikiki Beach.

(App. 7, 38, 39) Lois Millspaugh was in Waikiki Beach when she learned from Mr. Johnston that she had won custody of her daughter and that she would have thirty (30) days to return to regain custody. (App. 8) After leaving Waikiki Beach, she went to Silver Springs, Maryland, where she stayed for several days and then finally went back to Wabash to take custody of her daughter. (App. 8, 38, 39)

D. ADDITIONAL PERCEIVED MISSTATEMENTS IN THE PETITION FOR WRIT OF CERTIORARI.

Respondents would contend that Petitioners' Statement of the Case contains perceived misstatements or inaccuracies in addition to the omissions of important facts as described in this Statement of the

Case. Respondent would contend that the evidence does not support the allegations that an affidavit was submitted which knowingly contained false statements and unsupported conclusions. (Petition, p. 14) Nor is there evidence to support the Petitioner's suggestions and conclusions that there was not enough information to support the petition or demonstrate that the children were in need. (Petition 14, 15) In fact, both the District Court and the Court of Appeals held that Manetta Tucker's conduct in seeking the detention order was objectively reasonable under the circumstances which existed and that not only reasonable cause but substantial cause existed to initiate the proceedings. (App. 17-20, 66-68)

The suggestion that a series of hearings were held without notice is

also inaccurate. (Petition 16) The Petitioners admitted that they had actual notice of the initial hearing and indeed called to find out what happened after the hearing. (App. 30) Additionally the state court found that the Petitioners had actual notice but failed to appear. (App. 31) The Petitioners indicated on numerous occasions that they had no intention of participating in the proceedings and continued to travel around the country without indicating where they were going making normal service of process impossible. The Petitioners claim that they designated Paul Wildridge to receive process, but when service was attempted on Paul Wildridge, it was returned. (App. 30)

Furthermore, there is no evidence in the record that Manetta Tucker ever suggested or told the Petitioners that

they would not regain custody of their children unless they abandoned their religious mission. (Petition 16, 17)

Indeed the District Court so held in its decision. (App. 69, 70)

Furthermore there is no evidence to support the contention that Ms. Tucker tried to change the children's religious beliefs. (Petition 17) The Seventh Circuit also noted that the Petitioners' religion did not shield them from their parental obligations.

(App. 19)

V. SUMMARY OF THE ARGUMENT

Respondent would contend that this Court should not accept review on a Writ of Certiorari in this matter not only because the Seventh Circuit Court of Appeals and the District Court correctly decided the issues pursuant to the decisions of this Court; but

also since none of the considerations in Rule 10 of the Supreme Court Rules are present in this case.

The District Court determined that even under the Doctrine of Qualified Immunity that Manetta Tucker would be protected in this case. The District Court held that her conduct was objectively reasonable in light of the circumstances and that the Petitioners had failed to point out any violation of an established right in a particularized sense which was clearly established at the time these events occurred in 1984. The Petitioners have consistently argued throughout the course of this litigation that general rights of parenting are involved. This Court has already rejected similar arguments. The issue is not the general right of parenting, the issue is whether her conduct was objectively

reasonable or whether the Defendant would have known in 1984 that her conduct, under the circumstances which existed at the time, violated the Petitioners' constitutional rights. Thus, the Petitioners' characterization of the question presented for review is inaccurate under prior decisions of this Court.

There is no conflict in the circuits which would affect the outcome of this case. There are numerous circuit opinions which have accepted absolute immunity for a CHINS caseworker initiating the hearings, testifying at court proceedings and related conduct in preparing and submitting cases to the court. There is no conflict in the circuits for these allegations. The conflict in the circuits relates to the application of absolute immunity for allegations

concerning the investigation, taking custody and filing of a detention petition prior to the actual initiation of the CHINS action. The conflict in the circuits is of no assistance to the Petitioners in this case since the Seventh Circuit determined that qualified immunity applied to the investigation, obtaining the detention order and actual taking of custody of the child. The Fourth, Sixth and Ninth Circuits have found absolute immunity for these allegations. In all other aspects the Seventh Circuit's decision is consistent with the other circuit opinions for absolute immunity.

The Seventh Circuit opinion is consistent with this court's opinions for absolute immunity. The Circuit opinion found that the CHINS caseworker acts as both a prosecutor and witness in court proceedings and related

conduct. The Seventh Circuit utilized the functional approach espoused by this Court to determine whether the activities were integrally related to the judicial process and whether the harm depends upon judicial action. For all other activities the Court analyzed the actions and allegations based upon qualified immunity.

Finally, this case does not raise a new issue which needs to be decided by this Court. Petitioners suggest that this Court should decide whether the Brady v. Maryland rule, requiring the state to alert the adversary or court to exculpatory evidence, should be applied to civil cases. The Seventh Circuit did not reach this issue since it followed this Court's previous decisions that neither a prosecutor nor a witness can be sued under 42 U.S.C. 1983 for false testimony or failure to

provide the court with exculpatory evidence. As such there is no need for this court to decide the issue in this case.

**VI. ARGUMENT IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

**A. THERE IS NO CONFLICT AMONG
THE CIRCUITS AFFECTING THIS
CASE.**

The Seventh Circuit decided that the Defendant, as a CHINS caseworker, was entitled to absolute immunity for all of the Petitioners' allegations relating to testimony, presenting the case to the court, and other activities related to the court proceedings. The Court determined that the allegations of failure to give exculpatory information to the Court, the allegations of pursuing the litigation after it should have been clear the mothers were entitled to custody,

allegations concerning the motive for pursuing the litigation and allegations relating to adequate notice, would all be covered by absolute immunity. In all of those instances, it was the state court that made the decisions, with the knowledge that the Petitioners were not present in Court, with knowledge that they were not represented and that there was limited communication with the Petitioners. Thus, the Seventh Circuit held consistently with various other circuits that the CHINS caseworker was entitled to absolute immunity for these actions.

Contrary to the suggestion in the Petition for Writ of Certiorari, this approach is not in conflict with other circuits. (Petition 29) The petitioner argues that Hodorowski v. Ray, 844 F.2d 1210 (5th Cir. 1988); and

Austin v. Borel, 830 F.2d 1356 (5th Cir. 1987) are in conflict with the Seventh Circuit approach. These cases provide no support for the petitioner and indeed the Seventh Circuit notes that the Fifth Circuit approach is consistent. (App. 16) The Fifth Circuit has found absolute immunity for allegations involving a caseworker's testimony at a hearing. Stem v. Ahearn, 908 F.2d 1 (5th Cir. 1990) Hodorowski found qualified immunity for the seizure of children without a court order. Id. at 1214. So the court was not involved at all, whereas, in this case the seizure was made with a court order and numerous hearings were held by the state court. Austin involved a verified complaint submitted to obtain custody prior to the initiation of the child in need of services petition. Austin, Supra at 1360, 61, 62. The

Fifth Circuit applied qualified immunity holding that the custody petition did not initiate the proceedings under Louisiana law. Thus, it was more comparable to the police officer in a probable cause hearing for an arrest warrant.

These cases are not inconsistent with the Seventh Circuit holding. The Seventh Circuit relied on qualified immunity for all of the allegations similar to Austin and Hodorowski; that is, for the conduct of investigation, for initiation of the detention proceedings and for the actual taking custody of the children pursuant to the detention order.

Several other circuits have found absolute immunity where the Seventh Circuit applied qualified immunity. This conflict, however, certainly does not help the Petitioners in this case

since these opinions are more beneficial to the caseworker. Absolute immunity totally eliminates any suit against the caseworker. Some of the cases which have found absolute immunity for the investigation and initiation of child custody proceedings are: Coverdell v. Department of Social and Health Services, State of Washington, 834 F.2d 758 (9th Cir. 1987); Meyers v. Contra Costa County Dept. of Social Services, 812 F.2d 1154 (9th Cir. 1987); Vosburg v. Department of Social Services, 884 F.2d 133 (4th Cir. 1989); Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989); Malchowski v. City of Keene, 787 F.2d 704 (1st Cir. 1986). Thus, although there is a conflict as to one aspect of the Seventh Circuit opinion, it does not justify granting the Writ of Certiorari since the

resolution of the conflict will not change the result in this case.

The Petitioners' suggestion that the Seventh Circuit's decision is in conflict with Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), cert. denied 110 Sup. Ct. 1118 (1990), is similarly misplaced. In Babcock the Ninth Circuit found that a caseworker taking custody of the children pursuant to a court order and then placing the children, was absolutely immune under Section 42 U.S.C. 1983. Thus, the decisions are consistent.

As the Seventh Circuit noted, social workers must often act on limited information and if all doubts are resolved in favor of parents then significant damage can occur to the children. This Court has recognized the difficulties of caseworkers in such instances. DeShaney v. Winnebago

County Department of Social Services,

489 U.S. 189 (1989).

In the present case the CHINS caseworker acted as both prosecutor and witness in the state court proceedings. The Seventh Circuit noted that almost all of the Petitioners' allegations against Manetta Tucker depended upon the State Court's decisions. As such all of those allegations were covered by absolute immunity. Thus, there is no conflict among the circuits on any issue which would affect the result in this case. Regardless whether this Court would find absolute or qualified immunity for the initial investigation and child custody, the caseworker would still be entitled to judgment since the Seventh Circuit held that the caseworker's actions were objectively reasonable.

**B. THE SEVENTH CIRCUIT OPINION
IS CONSISTENT WITH THE
DECISIONS OF THIS COURT.**

This Court has decided that absolute immunity applies to the acts of a judge, and a prosecutor performing duties related to judicial functions as well as to a witness in court proceedings. Imbler v. Pachtman, 424 U.S. 409 (1976); Butz v. Economou, 438 U.S. 478 (1978); Briscoe v. LaHue, 460 U.S. 325 (1983); Stump v. Sparkman, 435 U.S. 349 (1978); and Burns v. Reed, 111 S.Ct. 1934 (1991). In Burns, this Court's most recent pronouncement, this Court held that a lawyer was absolutely immune from liability while representing the State during a probable cause hearing, but found qualified immunity for legal advise given to a police officer. This Court's functional approach reviews whether the conduct is integrally

related to the judicial process. If the actions are removed from the judicial process or the harm does not depend on judicial decision than qualified immunity applies. Malley v. Briggs, 475 U.S. 335 (1986).

The Circuit Courts of Appeals have found that a CHINS caseworker acts as both a prosecutor in presenting the case to the court, a witness in testifying before the court and further aids the court's jurisdiction by placement, case studied and related activities. The caseworkers need to exercise independent judgment in fulfilling their duties. The caseworker could easily become the "lightening rod" for litigation aimed at the court, as in this case. Furthermore, the caseworker must be able to exercise independent judgment to protect children from abuse, rather

than worry about financially devastating litigation. There are numerous state court hearings and appeals to protect the rights of the parents.

In addition to the Seventh Circuit these circuits have found absolute immunity for the court related duties of the CHINS caseworker or similar positions: Malchowski v. Keene, 787 F.2d 704, 711-14 (1st Cir. 1986); Walden v. Wishengrad, 745 F.2d 149 (2nd Cir. 1984); Vosburg v. Department of Social Services, 884 F.2d 133 (4th Cir. 1989); Stem v. Ahearn, 908 F.2d 1, 6 (5th Cir. 1990); Kurzawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984); Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989); Meyers v. Contra Costa County Department of Social Services, 812 F.2d 1154 (9th Cir. 1987); Coverdell v.

Department of Social & Health Services,
834 F.2d 758, 762-65 (9th Cir. 1987).

The Seventh Circuit held that the allegations of false testimony or withholding evidence from the Court was covered by absolute immunity. This is consistent with this Court's decision in Briscoe, Supra, that witnesses are absolutely immune for their testimony at a hearing even if the witness knows the testimony to be false.

Furthermore, this Court in Imbler, Supra, held that a prosecutor was absolutely immune for allegations of withholding exculpatory evidence from a defendant. Indeed, the Seventh Circuit holding is consistent with other circuit opinions including the Eighth Circuit which held withholding or suppressing exculpatory evidence was covered by absolute immunity. Meyers v. Morris, 810 F.2d 1437, 1446 (8th

Cir. 1987); Holt v. Castaneda, 832 F.2d 123 (9th Cir. 1987); Tripati v. INS, 784 F.2d 345 (10th Cir. 1986); Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989); Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989).

Although the Petitioners have suggested that immunity does not apply to ex parte hearings, the courts have not differentiated between an ex parte hearing and a hearing where all parties are present and represented by counsel. Indeed, this court noted in Burns that the circuits were unanimous that absolute immunity covered testimony and prosecutorial action before a grand jury. Burns v. Reed, 111 S.Ct. 1934, 1941 F.N. 6, (1991). Circuit courts have held that absolute immunity applies to other ex parte hearings and also to affidavits submitted to the court. Burns v. County of King, 883

F.2d 819 (9th Cir. 1989); Holt v. Castaneda, 832 F.2d 123 (9th Cir. 1987); Meyers v. Morris, 810 F.2d 1437, 1466 (8th Cir. 1987); Tripati v. INS, 784 F.2d 345, 348 (10th Cir. 1986); Malchowski v. City of Keene, 787 F.2d 704 (1st Cir. 1986).

Contrary to the Petitioners' suggestion, the Seventh Circuit Court of Appeals' decision is not in conflict with this Court's decision in Malley v. Briggs, 475 U.S. 335 (1986), and Illinois v. Gates, 462 U.S. 213 (1983). Both the District Court and Court of Appeals held that the Defendant caseworker acted in an objectively reasonable fashion in investigating and obtaining the detention order for the Petitioners' children. These actions were not based upon an uncorroborated informant's tip as in Gates. Both the District Court and the Court of Appeals

held that there was substantial supporting and corroborating evidence to support the anonymous tip given to the caseworker and reasonable cause to seek the detention order.

C. THE CASEWORKER WAS ENTITLED TO JUDGMENT UNDER EITHER QUALIFIED OR ABSOLUTE IMMUNITY.

The District Court entered judgment for the caseworker solely upon the Doctrine of Qualified Immunity finding that the Seventh Circuit had not specifically addressed the issue. The Court held that the conduct of the caseworker was objectively reasonable and that the Petitioners failed to set forth in any case or otherwise that the Defendant violated a right which was clearly established at the time in a particularized sense. (App. 65-70) Furthermore, the Seventh Circuit applied qualified immunity and found

that the caseworker's actions were objectively reasonable in the investigation, initiation of the proceedings and detention of the children.

Although the Petitioners continue to argue in the Petition for Writ of Certiorari that the caseworker violated general rights of parenting, this Court has rejected the Petitioner's approach.

Anderson v. Creighton, 483 U.S. 635 (1987). Indeed, under the Petitioners' approach qualified immunity would cease to exist for a CHINS caseworker since all of their actions involve the general right of parenting.

The caseworker's conduct was objectively reasonable, indeed, the Seventh Circuit noted that the failure to provide education for the children would have been a sufficient reason alone to obtain custody even ignoring

all of the other dangers to the children's health and welfare. The Petitioners had removed the children from school without taking any action to furnish their children with an education and without explaining in any fashion how they intended to educate their children. The Court noted that even today the mothers have not explained how they were going to supply the required education. (App. 18, 19) The mothers admitted that they did not have the money to enroll the children in correspondence school nor were they even at a location long enough to utilize a correspondence school.

In addition to the education concern numerous other factors existed to corroborate and cause concern as to the health and welfare of the children. Not only had the caseworker received a tip that the children were hungry, but

investigation revealed that the house had been stripped and was uninhabitable. The Petitioners and their children had no money and no food. They had no clothes except what they were wearing, and the Petitioners planned to travel without means to provide for the children. (App. 17, 18)

After the detention order was signed by the State Court, the Petitioners abandoned their children, visiting only once in a year, and refused to participate in any fashion in the proceedings in front of the State Court until ten months later when they hired a lawyer but still failed to participate in person.

Thus the Petitioners had made no provision to provide for their children's education, for a place to live, for food, for shelter or

clothing. This was also an emergency situation since the group was constantly moving and if the Welfare Department had not acted immediately, there would have been no way to locate or protect the children. Thus, even under qualified immunity the caseworker was entitled to judgment under Harlow v. Fitzgerald, 457 U.S. 800 (1982). This Court has noted that only the plainly incompetent or those who knowingly violate the law will not be protected by qualified immunity.

Malley v. Briggs, 475 U.S. 335, 341 (1986). Neither applies in this case.

D. THIS CASE DOES NOT RAISE A NEW ISSUE FOR THIS COURT.

The Seventh Circuit Court of Appeals did not decide whether a Welfare caseworker has an obligation in a civil case to alert the adversary to exculpatory evidence or inform the

court of exculpatory evidence. The Petitioners argue that this Court's opinions in Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), which decide the issue in a criminal case, creates this obligation. The Seventh Circuit did not decide this issue since it was unnecessary to its decision. This Court has already ruled that both a prosecutor and witness have absolute immunity under 42 U.S.C. 1983 for allegations of false testimony or withholding exculpatory evidence. Imbler, Supra, Briscoe, Supra, and Burns, Supra. Thus, the Seventh Circuit's decision is consistent with the prior decisions of this Court and there is no need to determine whether there is a comparable civil duty since it does not affect the issues or outcome in this case.

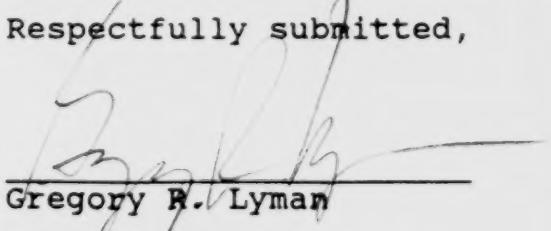
VII. CONCLUSION

Manetta Tucker contends that both the District Court and the Seventh Circuit Court of Appeals correctly entered judgment on her behalf.

Manetta Tucker would respectfully suggest that this case does not meet any of the criteria this Court normally utilizes in accepting a case for review pursuant to a Writ of Certiorari.

Manetta Tucker would respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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